115 U. S. 683.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. ~~889~~. 489

THE LOUISVILLE GAS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITIZENS' GAS LIGHT COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 6, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. 809.

THE LOUISVILLE GAS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITIZENS' GAS LIGHT COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

	Original.	Print.
Assignment of errors	1	1
Bond	2	4
Citation	3	7
Proof of service of citation	3	8
Citation	3	9
Proof of service of citation	4	10
Writ of error	4	11
Caption	5	12
Transcript from Louisville chancery court	5	13
Caption	5	13
Petition	5	14
Exhibit "Charter"—Act to incorporate The Citizens' Gas Light Company	13	44
Marshal's return on summons	17	61
Answer	18	62
Plaintiff's Exhibits—Report of committee as to purchase of Louisville Gas Works	32	118
Message of mayor to general council, Dec. 7, 1868	33	121
Proceedings of common council, Dec. 23, 1868	33	122
Proceedings of board of aldermen, Dec. 23, 1868	34	125
Proceedings of general council, Dec. 30, 1868	34	126

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Plaintiff's Exhibits—Proceedings of board of aldermen	35	127
Resolution of general council, approved, Dec. 26, 1868	36	129
Message of mayor to general council, Dec. 30, 1868	36	130
Report of committee on gas, approved Jan. 1st, 1869	36	131
Letter of J. Lawrence Smith, President Louisville Gas Company, to committee on gas, December 28, 1868	37	133
Proceedings of board of councilmen, Aug. 30, 1877	38	137
Proceedings of Board of councilmen, Sept. 6, 1877	39	141
Proceedings of board of councilmen, Sept. 20, 1877	40	142
Proceedings of board of councilmen, Oct. 4, 1877	40	144
Proceedings of board of councilmen, Oct. 11, 1877	41	146
Proceedings of board of councilmen, Oct. 25, 1877	48	148
Proceedings of board of aldermen, Sept. 6, 1877	42	250
Proceedings of board of aldermen Dec. 13, 1877	43	152
Ordinance granting the right to the Citizens Gas Light Co. to establish gas works &c.	44	154
Reply	46	162
Amended and supplemental answer	19	174
Plaintiff's Exhibit—Proceedings of board of aldermen, Nov. 26, 1879	50	175
Proceedings of board of councilmen, Nov. 26, 1879	50	176
Petition of W. N. Haldeman, presented Nov. 26, 1879	51	178
Resolution by general council	52	183
Orders postponing trial	53	184
Order allowing withdrawal of papers	53	186
Order postponing hearing	53	186
Order to read certain sections of rules of Board of councilmen	53	187
Amended answer	53	187
Order postponing hearing	55	193
Reply to amended answer	55	193
Judgment	55	195
Appeal allowed	56	196
Assignment of errors	56	196
Clerk's certificate	56	197
Argument of cause commenced	56	199
Argument and submission	57	200
Judgment	57	200
Opinion of the court	57	201

	Original.	Print.
Opinion of Judges Pryor and Lewis	58	240
Order as to rehearing	67	243
Motion and petition for rehearing submitted	67	243
Order as to time to file reply to petition for hearing	67	244
Petition for rehearing	67	244
Authorities cited	92	353
Reply to petition for rehearing	93	354
Additional petition for rehearing	98	376
Order overruling petition for rehearing	99	378
Response of the court to petition for rehearing	99	378
Clerk's certificate	99	381

1 *Assignment of Errors.*

Supreme Court of the United States.

LOUISVILLE GAS COMPANY, Plaintiff in Error,
vs.
CITIZENS' GAS LIGHT COMPANY, Defendant in Error.

First. The plaintiff in error in the above-styled case makes the following assignment of errors in this case:

The court of appeals of Kentucky erred, to the prejudice of the plaintiff in error, in adjudging and directing that *that* the judgment rendered by the Louisville chancery court in the case of The Citizens' Gas Light Company, the defendant in error, *vs.* The Louisville Gas Company, the plaintiff in error, should be reversed, and cause remanded to said court with directions to said court to issue a perpetual injunction, restraining the said Louisville Gas Company from claiming and exercising the exclusive right to manufacture and supply gas to the city of Louisville and citizens of Louisville, and in adjudging costs in favor of said Citizens' Gas Light Company against said Louisville Gas Company. The said erroneous and prejudicial judgment of said court of appeals will be found on pages 189, 190 of the record, at the end of the opinion, copied into the record, and was rendered June 16, 1883, but suspended by a petition for rehearing filed by said Louisville Gas Company, which petition was filed September 3, 1883, and was finally overruled September 22, 1883.

2 The said judgment of said court is erroneous, in that it deprives the plaintiff in error of the benefit of the contract made between it and the State of Kentucky, embraced in and evidenced by the sixth section of the act of the Legislature of Kentucky, chapter 1282, entitled "An act to amend an act entitled 'An act to extend the charter of the Louisville Gas Company, approved January 30, 1868,'" approved January 22d, 1869, by which the said State of Kentucky agreed "That no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the city council and the directors of the Gas Company." Said judgment interferes with and impairs the obligation of said contract.

Second. It was error, to the prejudice of the plaintiff in error, in the judgment of said court of appeals of Kentucky to adjudge and declare that the charter of the plaintiff in error and the sixth section thereof were subject to amendment, alteration, and repeal by virtue of the provisions of the eighth section of the act of the Legislature of Kentucky of February 14, 1856, which declared that "all charters or grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." And the judgment based upon such construction of said act is prejudicial to the rights of the plaintiff in error, granted by its said charter, and impairs the obligation of the

contract for an exclusive privilege to vend gas to the city and citizens of Louisville therein made with the plaintiff in error, and expressly set out in said 6th section of the amended charter of plaintiff in error, approved Jan'y 30, 1869.

3 Third. It was error in said judgment, prejudicial to the plaintiff in error, to adjudge and declare that the act of the Legislature of the State of Kentucky, of the 21st day of March, 1872, granting to the defendant in error the charter it sets out in the pleadings, repealed the said sixth section of the amended charter granted the plaintiff in error by the Legislature of Kentucky, and approved January 30, 1869, and deprived plaintiff in error of its said exclusive right to make and vend gas to the city of Louisville and citizens thereof. The construction thus given to the said charter of the defendant in error impaired the obligation of the contract between the State of Kentucky and plaintiff in error, contained in said sixth section of the amended charter granted it by said State, and approved January 30, 1869, and deprived it of the exclusive and beneficial privilege and right therein granted for and during the charter life of said Louisville Gas Company.

Wherefore the plaintiff in error, the said Louisville Gas Company, prays the Supreme Court of the United States to reverse the said judgment of the said court of appeals of Kentucky, and to set aside the mandate of said court, issued upon said judgment to the Louisville chancery court, and to affirm the judgment of said chancery court.

J. B. KINKEAD,
Attorney, of Counsel.

4 Court of Appeals of the Commonwealth of Kentucky.

CITIZENS' GAS LIGHT CO. *vs.* LOUISVILLE GAS CO.

Know all men by these presents, that we, Louisville Gas Company and Henry Whitestone, are held and firmly bound unto Citizens' Gas Light Company in the sum of five hundred dollars, to be paid to the said Citizens' Gas Light Company and its assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 20th day of November, A. D. 1883.

Whereas the above-named Louisville Gas Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the court of appeals of the Commonwealth of Kentucky:

Now, therefore, the condition of this obligation is such, that if the above-named Louisville Gas Company shall prosecute its said appeal to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall

5 be and remain in full force and virtue.

____ ____.

HENRY WHITESTONE. [SEAL.] [SEAL.]

Sealed and delivered in presence of—
JNO. K. GOODLOE.

Approved this 20th day of November, 1883.
THOS. F. HARGIS,
Chief Justice, Ky. C't App'ls.

6 [Endorsed:] Citizens' Gas Light Company *vs.* Louisville Gas Company. Appeal bond.

7 UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

To Citizens' Gas Light Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the 13th day of October next, pursuant to a writ of error, filed in the the clerk's office of the court of appeals of the Commonwealth of Kentucky, wherein Louisville Gas Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thos. F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky, this 26th day of April, in the year of our Lord 1884.

THOMAS F. HARGIS,
Chief Justice Court of Appeals of Kentucky.

8 Executed this citation on the Citizens' Gas Light Co., by delivering a true copy thereof to F. D. Carley, president of said company, in the city of Louisville, this 28th day of Ap'l, 1884.

A. J. AUXIER,
United States Marshal,
By J. H. MOODY, *D. M.*

Service, $2.00.

[Endorsed:] Citizens' Gas Light Co. *v.* Louisville Gas Co. Citation. Supreme Court U. S. 1883, October term. No. 1243. The Louisville Gas Co., pl'ff in error, *vs.* The Citizens' Gas Light Company. Citation. Office Supreme Court U. S. Filed Apr. 30, 1884. James H. McKenney, clerk.

9 UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

To Citizens' Gas Light Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the 13th day of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the Commonwealth of Kentucky, wherein Louisville Gas Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judg-

ment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thos. F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky, this 20th day of November, in the year of our Lord, 1883.

THOS. F. HARGIS,
Chief Justice.

10 I, W. N. Haldeman, president of the within-named Citizens' Gas Light Company, hereby acknowledge the service of the within citation, I having this day received a correct copy thereof.

Given under my hand, this 21st day of November, 1883.

W. N. HALDEMAN,
Pres't Citizens' Gas Light Co.

Attest: JNO. K. GOODLOE.

[Endorsed:] Citizens' Gas Light Company *vs.* Louisville Gas Company. Citation.

11 UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

The President of the United States of America to the judges of the court of appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said court of appeals before you, between the Citizens' Gas Light Company, appellant, and the Louisville Gas Company, appellee, a manifest error hath happened, to the great damage of the said Louisville Gas Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court at Louisville, in said district, this fourteenth day of November, A. D. 1883, and of the Independence of the United States the one hundred and eighth.

[SEAL.] SAM'L B. CRAIG,
C. C. C. K. D.

12 *Style of Appeal to C't Appeals.*

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

At a court of appeals continued and held for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 22nd day of September, 1882.

Present: Hons. Thomas F. Hargis, chief justice; W. S. Pryor, Joseph H. Lewis, and Thomas H. Hines, associated judges.

Upon an appeal from the Louisville chancery court.

THE CITIZENS' GAS LIGHT COMPANY, Appellants,

against

THE LOUISVILLE GAS COMPANY, HENRY WHITESTONE, W. C. W. White, W. Geo. Anderson, George Mulliken, C. P. Moorman, G. W. Morris, T. L. Barrett, and Isaac Wolf, as Directors of the Louisville Company, Appellees.

13 Be it remembered that heretofore, to wit, on the 13th day of December, 1881, the appellants, The Citizens' Gas Light Company, filed in the office of the clerk of the court of appeals of the Commonwealth of Kentucky the following transcript (to wit):

Style of Suit in Lower Court.

COMMONWEALTH OF KENTUCKY, *set:*

Louisville Chancery Court.

Pleas before the Hon. I. W. Edwards, chancellor of the Louisville chancery court, held at the court-house, in the city of Louisville, on the 29th day of November, 1881.

THE CITIZENS' GAS LIGHT COMPANY OF LOUISVILLE, Plaintiff,

vs.

14 THE LOUISVILLE GAS COMPANY and HENRY WHITESTONE, W. C. Hite, W. Geo. Anderson, George Mulliken, C. P. Moorman, Geo. W. Morris, T. L. Barrett, and Isaac Wolf, the Managers and pretended Directors thereof and pretended Stockholders therein, Defendants.

Be it remembered that heretofore, to wit, on the 11th day of October, 1879, came the plaintiff by Byur & Davie *et al.*, counsel, and filed in the clerk's office of the court aforesaid *there* original petition herein, which is in words and figures as follows, to wit:

Pff's Petition.

The plaintiff, "The Citizens Gas Light Company of Louisville," which is a corporation duly incorporated under the laws of Kentucky, as hereinafter more fully shown, states that by an act of the Gen-

eral Assembly of the Commonwealth of Kentucky, approved
15 February 15th, 1838, entitled "An act to incorporate the Louisville Gas and Water Company," there was created a corporation by the name of "The Louisville Gas and Water Company." By an amending act approved January 31, 1842, the name of said corporation was changed to "The Louisville Water Company."

By the 10th section of its said charter it was provided that the said company should, during the existence of said charter, have the privilege of erecting, establishing, and constructing a gas-works in the city of Louisville, and of laying mains and pipes for gas under the streets, alleys, and other public places of said city, and of selling and supplying gas to the said city and its citizens. And by the first section of its said charter it was provided that the said
16 corporation should exist and "continue for thirty (30) years from the first day of January, 1839." The said acts of February 15th, 1838, and January 31st, 1842, are referred to as parts of this petition.

The said corporation, thus created to live for the said period of thirty years, organized and constructed and operated a gas-works in Louisville, Ky., and continued to exist and transact the business of selling gas as such corporation under the name of "The Louisville Gas Company," and by virtue of said charter, until the 1st day of January, 1869, when, in accordance with said charter, its term of existence ended and its charter expired.

By its said expiration all powers and rights and franchises
17 conferred upon it by its said charter ceased and came to an end.

Plaintiff states that on or soon after the 22nd day of January, 1869, and some time after the expiration of said first named corporation, several persons combined together to organize and carry on the gas business in Louisville, Kentucky, and became jointly interested therein, and assumed the name and style of "The Louisville Gas Company" for conducting their said business, and purchased, or claimed to purchase, much of the effects of the said defunct corporation of 1838, including its said gas-works, pipes, and other apparatus for conducting the gas business, and they have ever since been making and selling gas in and throughout said city and Portland and the territory adjacent thereto. The said persons, at
18 said time, pretended to organize as a corporation, and have pretended ever since to be a corporation and to conduct their business as such, under and by virtue of a pretended act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to extend the charter of the Louisville Gas Company, approved January 30th, 1867, and a pretended amendment thereto, entitled "An act to amend an act entitled An act to extend the charter of the Louisville Gas Company, approved January 30th, 1869, which said pretended amendment was approved January 22nd, 1869.

By the second section of said pretended act of January 28th, 1867, it was provided "that a company shall be, and the same is hereby, incorporated, with a capital of fifteen hundred thousand

dollars, and that the individuals, natural or corporate, who
19 should subscribe for the said stock, they and their successors and assigns, shall be created a body politic and corporate by the name and style of the Louisville Gas Company, and shall so continue for twenty years from the 1st of January, 1869."

By the 4th section of said pretended act of 1867 it was provided that the said pretended corporation thereby created "might carrry on the business of making and furnishing gas to the city of Louisville and the inhabitants thereof, and to vend the same."

By the 11th section of said pretended act of 1867 it was provided that said pretended corporation might lay pipes in the streets, alleys, and public places of Louisville, and might tear up the streets of said city for that purpose.

By the 5th section of said pretended amending act of January 22nd, 1869, it was provided that the said pretended corporation
20 should have the exclusive privilege of erecting and establishing a gas-works in the city of Louisville during the continuance of this charter, and of vending coal-gas lights and supplying the city and citizens with gas by means of public works." The said pretended acts are printed in the Acts of the General Assembly of the Commonwealth of Kentucky of 1867, vol. 1, page 188, and Acts of 1869, vol. 1, page 166, and are referred to as parts of this petition.

Plaintiff states that ever since said pretended organization of said pretended company, on or after the 22d of January, 1869, the said persons who were so engaged in conducting said gas business, and who were claiming to be stockholders and incorporators in said pretended corporation, have been appointing certain persons of
21 themselves to act as the managers and directors of said business for and in behalf of them all, which persons have always since pretended to be the directors of said pretended corporation.

The said persons who are now acting as such managers or directors are the defendants, Henry Whitestone, W. C. Hile, J. M. Monohan, W. Geo. Anderson, George Mulliken, C. P. Moorman, Geo. W. Morris, T. L. Barrett, and Isaac Wolf, who are made defendants hereto, as such pretended stockholders and directors, and as such managers.

Plaintiff states that it was created a corporation by an act of the General Assembly of the Commonwealth of Kentucky, approved March 21st, 1872, entitled "An act to incorporate the Citizens' Gas Light Company of Louisville." A copy of said act, duly certified
22 under the hand and official seal of the secretary of State of Kentucky, is herewith filed as part hereof, marked "Charter." The said act has never been repealed, but is now in full force, and the plaintiff has organized, and is ready to carry on business thereunder.

By the first section of said act the plaintiff was "created a body corporate and politic," by the name of "The Citizens' Gas Light Company of Louisville," and was given the franchise to be a corporation "for the purpose of making, selling, and distributing gas, for the

purpose of lighting the buildings, public and private, in the city of Louisville, and its adjoining territories, together with the streets, highways, lanes, alleys, parks, and other public places therein," and it was, by said section, also empowered to buy, hold, and sell
23 property, to contract and be contracted with, to sue and be sued, and "before all tribunals to appear and protect its rights."

By the second section of said act the plaintiff was authorized, in order to raise money to carry out its said purposes, to issue and sell its stock to the amount of $750,000 in shares of $100 each, with the privilege of increasing it to $2,000,000; provided, a majority of its stockholders should vote for such increase.

By the third section of said act the plaintiff was authorized, and was given the franchise, "with the consent of the general council of the city of Louisville, to open the ground in any highway, street, lane, alley, park, or other public place, within the limits aforesaid, and lay and repair therein their pipes for conducting gas."

24 By the 4th section of the said act the plaintiff was authorized and was given the franchise to open ground, to lay and repair pipes for conducting gas to consumers in Portland and other towns adjoining said city of Louisville, and in the highways, streets, alleys, lanes, and other public places thereof.

By the 13th section of said act it was provided that the said charter of the plaintiff should continue in force for the term of fifty (50) years from March 21st, 1872, the date of its passage.

Plaintiff states that by an ordinance passed by the general council of the city of Louisville the said general council of the city of Louisville has consented that plaintiff may establish a gas-works, and lay down its pipes and mains in and along the streets, alleys, and public ways of the city, and make such other connections
25 and arrangements as might be needful and necessary for the supply of gas to the citizens or city, for a period of twelve years from the 13th of December, 1877.

Plaintiff states that by virtue of its said charter, and of the powers and franchises thereby conferred upon it, and by reason of the premises, it has for the period of fifty years, from March the 21st, 1872, the full right, franchise, and authority to sell its said stock, and with the proceeds thereof to establish and operate a gas-works in the city of Louisville, and, for twelve years from and after December 13th, 1877, to lay mains and pipes in the streets, alleys, and highways, and lanes, and other public places of Portland and other towns and territory adjoining the city of Louisville, and to make, sell, and supply coal-gas for lighting the buildings and other places,
26 public and private, in all of said localities.

Plaintiff is advised and charges that the said pretended acts under which the defendants claim to be a corporation, and under which they claim to have the exclusive privileges, hereinafter more fully set forth, are void and of no effect, and did not create or confer any such rights or privileges.

It states that the subject of the said pretended acts of January 30th, 1867, and January 22nd, 1869, was the creation of a new cor-

poration, to wit, the pretended "Louisville Gas Company" of 1869, whereas the titles of the same falsely pretended that the subject of said acts was to extend the said charter of 1838 of the said gas company of 1838, and the said pretended acts were in violation of the constitution of Kentucky, and are void and a nullity in law,
27 because the subject of said acts was not expressed in the titles thereof; and the defendant's said pretended corporation is not a corporation and has no right by virtue of said pretended acts.

And plaintiff further states that the said pretended corporation did not undertake to perform, nor did it perform, any public services, and the said pretended acts, to the extent that they pretended to grant such exclusive privileges to said pretended corporation, were in violation of the constitution of Kentucky, and are void and of no legal effect, because it is an attempt to grant an exclusive privilege to one person or set of persons not in consideration of public services.

And plaintiff further states that if the said section of said
28 pretended act of January 22nd, 1869, purporting to give to the defendants the exclusive privilege of establishing gas-works, laying pipes, and selling gas, in Louisville, was lawfully passed, or was ever valid, (which plaintiff denied,) it was, by the statutes of Kentucky, in force at the time of its passage, subject to repeal; and it was also subject to repeal, at the time the act incorporating the plaintiff was passed, as an unreasonable monopoly of, and restraint upon, trade, and as in derogation of public policy and interests, and as contrary to the welfare of the said city and its citizens, and as a public nuisance by which the inhabitants of said city were, in the absence of competition, greatly wronged and oppressed by extortionate charges for inferior gas; and plaintiff says
29 that the said charter of defendant, if ever valid, was repealed, so far as it gave defendant said exclusive privileges, by the said act of March 21st, 1872, incorporating the plaintiff and giving it also the right to establish a gas-works and to lay pipes and to make and sell gas in said city; and said exclusive privilege, if it ever existed, was thereby ended, and has never since existed, as against the plaintiff.

And the plaintiff further states that if the defendant ever had any such exclusive privilege it was only to the extent that the defendants should have the exclusive privilege of establishing, operating, and selling gas by means of a "public works;" and the plaintiff says that the gas-works which the plaintiff is to establish and operate is not to be a "public works," but only a private cor-
30 porate enterprise, claiming and having no monopoly, but in free competition with any other persons or corporations who may engage in said business; and the plaintiff says that the defendants have no exclusive privilege as against the plaintiff.

Yet the plaintiff says that, notwithstanding the premises, the defendants have, ever since the said organization of their pretended corporation, on or soon after January 22nd, 1869, been wrongfully and falsely asserting, pretending, and claiming publicly, openly, and

to all the exclusive privilege of establishing and operating a gas-works, laying pipes, and vending coal-gas in said city of Lovisville, Portland, and the territory adjacent thereto, and they are now publicly and openly asserting and pretending the same, and
31 threaten to and, unless restrained by this honorable court, will continue to so assert and pretend and claim; and the defendants, ever since the plaintiff was so incorporated and organized as a gas company, have been wrongfully and falsely asserting, claiming, and pretending publicly, openly, and to all that the plaintiff has no right or franchise to establish or operate a gas-works, or to lay pipes, or to sell coal-gas in said localities, or to carry on its gas business there, without which plaintiff and its said franchises, as a corporation, would be of no force or value, and that the plaintiff had no such valid franchises, and that plaintiff's said charter and its franchises thereunder are of no force or effect, and the defendants are still asserting, claiming, and pretending the same, and
32 threaten to and, unless restrained by this honorable court, will continue to so assert and pretend and claim until the expiration of their said pretended charter, to wit, until January 1st, 1889.

Plaintiff states that, in order to avail itself of its said rights and franchises, to exist and do business as an incorporated gas company, to establish its gas works, to lay gas pipes, and to make and sell gas in said localities, as provided for in its said charter, it will be obliged to expend a large sum of money, to wit, over five hundred thousand dollars, in the erection of suitable works, buildings, fixtures, machines, and other structures and apparatus, and in opening said streets and alleys, and in purchasing and laying
33 such mains and pipes, and in making connections with houses and other places necessary for its said business; and plaintiff states that, in order to raise said sums, it is, and will be, necessary for it to sell its said stock to the public, as its said charter allows, and that it has no other means than that, which is the usual means of raising the necessary funds to carry on the business of such incorporations.

Plaintiff further states that it has been, ever since its said organization as a corporation, and it still is, the owner, and possessed of, said franchises and rights to sell its stock as a corporation, and to lay said pipes and mains, and to carry on said gas business in said localities, and it has been, and still is, ready and anxious to sell its stock, and to begin on a large scale the erection of a suitable
34 gas-works and other necessary buildings and machinery and the laying of pipes; and if it had not been obstructed and prevented by the wrongful acts of the defendants, and by the cloud upon its title to the said franchises, it would before *before* now have been able to sell, and would have sold, large amounts of its stock, sufficient to have established its said business, as provided for in its charter, and it would have established its said gas-works and laid its pipes, and would have sold its gas to the citizens at reasonable and proper prices, and would thereby have made great profit, to wit, over fifty thousand dollars, and would now and hereafter have a

business and a good-will of great value and profit. Plaintiff
35 states that it is of the greatest importance to it, as well as to the city of Louisville, that it be enabled without further hindrance or delay to sell its said stock and to raise means thereby and to complete its said works, and to establish and conduct its said business. Of the time of its existence by its charter, nearly eight years have already been lost, and of the twelve years during which the city council of Louisville consented to its laying pipes, &c., in its streets, &c., nearly two years have been lost (all by reason of the wrongful acts of the defendants and the said cloud upon its said title), and the value of its said franchises has already been greatly depreciated, and is being daily lessened, and it is fast losing the great advantages and profits it would make if not wrongfully
36 obstructed by defendants, as hereinafter set forth. It states that the defendants' said pretended company, by its many oppressions and irregularities, and by only supplying very inferior gas and the making exhorbitant charges therefor, has caused great complaint and dissatisfaction among the people of the localities wherein it claims its said monopoly, and has created a great demand for another and a competing gas company; and another and competing gas company is necessary for the public interests of said city and its citizens, and, if not prevented by said wrongful acts of the defendants and said cloud on its title, the plaintiff would be able to readily sell its stock & at good prices, and to establish its business, and it would be able to and would make and sell much better
37 gas than that sold by the defendants, and at a reasonable price, much less than that exacted by the defendants' company, and the plaintiff would thereby obtain a large patronage and make profit thereby.

And the plaintiff further states that by the terms of the said ordinance by which the general council of the city of Louisville granted to the plaintiff the right of laying pipes and mains in the streets, alleys, and other public places of said city, the plaintiff undertook and became bound to proceed as rapidly as practicable to establish its said gas-works, and, if practicable, to make an investment in works and mains by December 13th, 1879, equal in value to the sum of $75,000, and to execute a bond, with good
38 security, to the amount of $75,000, conditioned for the faithful performance of the provisions of said ordinance. It states that by reason of the matters herein set forth it has heretofore been unable to perform its said undertakings, although ready and anxious to do so, and that it will be necessary to have the said cloud removed from its title before the plaintiff can sell its stock or raise the means to make said investment or obtain security from its said bond, and if longer prevented from doing so it will suffer great and irreparable injury; and if the defendants be enjoined, as hereinafter prayed for, the plaintiff will be enabled to comply with all the said undertakings, without delay and according to its promises, and will thereby prevent great loss and injury to it.

39 Plaintiff states that the said pretended charter of defendant's said company, to wit, the said pretended acts of Janu-

ary 30, 1867, and January 22nd, 1869, are a cloud upon the title and rights of the plaintiff to its said franchises, and that by reason of them and of the said false and wrongful pretentions of defendants thereunder the plaintiff has been, and is, and, unless relieved by the injunction of this court, will continue to be, prevented and rendered unable to sell its said stock, or to establish or to operate a gas-works, or to lay pipes, or to make or sell gas in said localities. It states that the said claims and pretentions of defendants, that their said company has a valid charter, and that the said pretended acts of 1867 and 1869 are valid, and that they have the said
40 exclusive privilege of establishing and operating a gas-works, laying pipes, and selling gas in said localities, and that the plaintiff has no right to carry on its said business there, are calculated and are intended by defendants to cloud and impair and destroy, and, unless restrained by this honorable court, will impair, cloud, and destroy the value and usefulness of plaintiff's said charter and franchises and the credit of the plaintiff, and are calculated to, and will, impede and defeat (as they have heretofore impeded and defeated) the plaintiff's efforts to sell its stock and to construct and operate its gas-works, and to lay its pipes and to sell and supply gas, as it is given the right to do by the said statute by
41 which it was incorporated, and will entirely defeat the purposes of said statute.

Plaintiff states that the defendants' said company threatens to prevent the plaintiff from laying its pipes in the city of Louisville and in the streets, alleys, and other public places thereof, and, unless restrained by this honorable court, they will continue to so threaten, and will prevent the plaintiff from so doing, to the great and irreparable injury of the plaintiff.

Plaintiff states that it has been greatly injured in the enjoyment of its said franchises, and greatly damaged, to wit, in the sum of more than $100,000 by the said unfounded pretentions and wrongful acts of the defendants, in setting up the said void acts to obstruct and defeat the plaintiff's business; and the plaintiff has
42 suffered and, unless relieved by the injunction of this honorable court, will continue to suffer thereby great and irreparable injury, for which it has no adequate remedy, except by the injunction of this honorable court.

Wherefore the plaintiff calls on the defendants to set up herein their claims to such exclusive privilege, if any they have; and, upon final hearing, it prays that this honorable court will adjudge that the plaintiff's said charter is valid, and that it has the lawful rights and franchises to sell its said stock and to establish and operate a gas-works, to lay mains and pipes in the streets, alleys, highways, lanes, and other public places, and to make, supply, and sell gas in and throughout said localities of Louisville, Portland, and
43 the territory adjacent thereto, and that this court will also adjudge that the defendants' said pretended company has not, and that the defendants have not, any exclusive privilege or franchise to establish or operate a gas-works, or to lay pipes, or to make or sell gas in said localities, and that the said pretended acts

of January 30th, 1867, and January 22nd, 1869, are unconstitutional and void, and do not affect the plaintiff's rights under its said charter; and it prays that the defendants be perpetually restrained and enjoined from setting up any claim to such exclusive privileges, or to any privileges, under said pretended acts or otherwise, and from in any manner impeding or preventing the plaintiff from the full enjoyment of its said franchises, rights, and privileges, and
44 from in any manner casting a cloud over the same.

And the plaintiff prays judgment for its costs herein expended, and it prays for all general and proper relief.

BIJUR & DAVIE,
BARRETT & BROWN,
BEATTIE & WINCHESTER,
Att'ys for Pl'ff.

Walter N. Haldeman states that he is the president of the Citizens' Gas Light Company of Louisville, and that the statements of this petition are true.

W. N. HALDEMAN.

Subscribed an sworn to before me, by W. N. Haldeman, this October 11th, 1879.

GEO. M. DAVIE, *N. P. J. C.*

And the plaintiff filed with the foregoing petition the following exhibit, marked "charter:"

45 Which said exhibit is in words and figures as follows, to wit:

EXHIBIT BY PL'FF. "CHARTER."

Chapter 702.

An act to incorporate the Citizens' Gas Light Company of Louisville.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That Thomas C. Coleman, Walter N. Haldeman, James Barrett, H. V. Newcomb, G. F. Fuller, C. D. Standiford, Isaac Caldwell, F. F. Fox, and J. P. Johnston, and other associates, successors, and assigns are hereby created a body corporate and politic by the name of "The Citizens' Gas Light Company of Louisville," for the purpose of making, selling, and distributing gas for the purpose of lighting the buildings, public and private, in the city of Louisville and its adjoining territories, together with the streets, high-
46 ways, lanes, alleys, parks, and other public places, and for other purposes, and by that name shall have perpetual succession; and are made capable in law to take, purchase, possess, retain, have, hold, and enjoy, to them, their successors and assigns, estates and interests of every kind, real, personal, and mixed, legal or equitable, and the same to manage, control, let, lease, assign, grant, bargain, sell, alien, convey, confirm, and dispose of, at pleasure, to sue and be sued, plead and be impleaded, answer and be an-

swered unto, defend and be defended against in any competent court of law or equity, and before all tribunals to appear and protect its rights to make, have, and use a common seal, and the
47 same to break, alter, and renew at pleasure, and shall also have power to establish and put in execution, such by-laws and regulations, not contary to law, as they may deem necessary or convenient for the government of said corporation, and the managements of their property and concerns, and the duties and employment of their officers and agents, and the same to change, alter or amend and generally to do all things necessary and proper to carry into effect the powers and privileges herein granted.

SECTION 2. The capital stock of said company shall consist of seven hundred and fifty thousand dollars, in shares of one hundred dollars each, but the stockholders of any special meeting, called for that purpose, may increase such capital stock to any sum not ex-
48 ceeding two millions of dollars, under such regulations and conditions as they may deem expedient, the holders of a majority of the stock voting for such increase, and casting one vote in person or by proxy for each share of such stock held by them.

SECTION 3. Said company shall have power and authority, with the consent of the general council of said city, to open the ground in any highway, street, lane, alley, park, or other public place within the limits aforesaid, and lay and repair therein their pipes for conducting gas, said company restoring the same to as good condition as before, within a reasonable time thereafter, said company being required, in so doing, not to injure any gas or water-pipe, or connection or sewer laid therein; and said corporation being liable
49 to the city of Louisville for any damage it may have to pay for its negligence in so laying, repairing, or restoring as aforesaid; and such power and authority is subject to such reasonable regulations as the mayor and city council may make for the protection of life, property, and health of citizens.

SECTION 4. The said company shall have authority to open ground, to lay and repair pipes for conduction of gas to consumers in Portland and other towns adjoining said city of Louisville, in the highways, streets, lanes, alleys, and other public places thereof, subject to such reasonable regulations by the municipal authorities thereof, respectively, as they shall prescribe, said company laying, repairing, and restoring the same, to like condition as before, within a reasonable time.

50 SECTION 5. The shares in said capital stock are hereby declared to be personal estate and transferable on the books of the company in such manner as the board of directors shall prescribe, and the whole of said capital stock shall be paid in within two years from the organization of the company under this charter, and in such equal installments, and at such times as shall be prescribed by the directors, of which ten days' notice shall be given personally to each stockholders, or by mail, or published in one of the newspapers daily printed in Louisville, of the time and place of paying the same; and said capital stock shall not be liable to assessment except for

said installments to the amount in all of one hundred dol-
51 lars on each share; and said company may provide, by its by-laws, for the forfeiture of stock in part, or only a part of which has been paid, and for the sale of such stock to pay any balance due thereon, and sue for and collect such balance due thereon as may be deemed most expedient, and may likewise by by-laws provide that unpaid shares of stock shall not be voluntarily transferred until the whole amount of such stock is paid in, and may proceed direct against the original subscriber or his assigns.

SECTION 6. The first meeting of the company for the election of directors and organization under this charter, and for the transaction of any other business of the corporation may be called at such time and place as shall be fixed by a written or printed notice signed
52 by any one or more of the incorporators named in the first section of this act, and personally served on the other corporators named in said first section of this act, or upon publishing said notice seven days in any new-paper printed in Louisville, at which time and place those corporators, named as aforesaid, who shall meet at said time and place, shall constitute a quorum for doing business, and who may choose directors for said company, consisting of not less than three nor more then seven members, who shall severally hold their offices for one year, and until others are chosen to act in their stead, unless sooner removed by the corporation or by death. An annual meeting of stockholders shall be had one year from the day on which the first or the preceding election of a board
53 of directors shall have taken place for the election of a new board, unless it shall be a Sunday, in which case the Monday following; but the neglect or other fault of the company to so elect, or to do any other act required to be done by the company, its stockholders, or directors, shall not work a forfeiture of this charter or of the privileges and advantages under the same; and in case of removal or holding over their terms, such board of directors may be elected at any special meetings of stockholders; special meetings of stockholders may be called by the president of the company, or in case of his absence, neglect, inability, or refusal to act, by any of the stockholders, who shall hold one-third of the shares of the stock, of which ten days' previous notice shall be
54 given in a new-paper printed in the city of Louisville, as provided by the by-laws of said company; at any meeting of stockholders two-thirds of the shares of stock shall be represented in person or by proxy to constitute a quorum to do business, and a vote for each share shall be cast in person or by proxy at such meeting, but any number of shareholders may adjourn such meeting from time to time until a quorum shall be present.

SECTION 7. The board of directors shall choose a president and treasurer from among their number, who shall hold their office one year, or until others are chosen and qualify, and may choose such other officers as they may deem expedient, who shall give
55 bonds to the company for the faithful performance of their duties in such sum and with sureties as shall be satisfactory to the board. The board shall have the immediate government of

the property, business, and affairs of the company, and shall meet as often as they think proper, the president presiding, and in case of an equal division having a casting vote; a majority of the board constituting a quorum, and the board of directors or the president and treasurer, when authorized by the board of directors, shall have power to make contracts, to manage and dispose of the property and funds of the company in such manner as they shall deem for the interest of the stockholders; and the board shall receive no compensation for their services unless voted them by the stock-
56 holders, and the directors shall make such dividends annually of the profits, if any, as to them shall seem proper.

SECTION 8. In all proceedings at law or in equity in which this corporation shall be a party, the leaving of an attested copy of any process with the treasurer, or person acting as such, or at his usual place of business, with some person of suitable age and discretion, shall be deemed sufficient service thereof.

SECTION 9. The said company shall have power to issue its bonds, to extend its works and pipes, to an amount not exceeding one-half the amount of capital stock actually paid in at the time.

SECTION 10. If any person shall wilfully or maliciously do, or cause to be done, any act whatever whereby the works of said company, or any part thereof, or any pipe, conduit, plug, cock,
57 reservoirs, or any engine, machine, meter, or structure, or any matter or thing appertaining to the same, shall be injured, destroyed, stopped, obstructed, impaired, weakened, or interfered with, the person so offending shall forfeit and pay said company double the amount of damages sustained by means of such offense or injury, to be recovered in an action of debt to be brought in the name of said company in any court of competent jurisdiction, together with costs of suit.

SECTION 11. Any person or persons who shall wilfully or fraudulently injure, or suffer to be injured, any pipes, fittings, or meters belonging to this corporation, or prevent any meter from duly registering the quantity of gas supplied through the same, or
58 shall alter the index of any such meter, or in any way hinder or interfere with its proper action or just registering, or shall fraudulently burn the gas of this corporation or waste the same, shall, for every such offence, forfeit and pay to this corporation the sum of twenty-five dollars, and in addition thereto shall pay to said corporation the amount of damage by them sustained by reason of such injury, prevention, waste, consumption, or hindrance.

SECTION 12. Any person duly authorized, in writing, by this corporation, over the signature of the president or treasurer, at all proper times of the day may, on presenting such written authority, enter any dwelling, storeroom, place, or building supplied with lighting apparatus by this corporation, for the purpose of in-
59 specting and examining the meters, pipes, fittings, and works for supplying and regulating the quantity of gas consumed or supplied, and in case of non-payment of any sum due for gas previously supplied according to his or their contract with this cor-

poration, to prevent and stop the gas from entering the premises of such person or persons, and take and carry away any such meter, pipe, fitting, or other works from the mains or pipes of this corporation.

SECTION 13. This act shall take effect from and after its passage and be and continue in force for the term of fifty years.

JAMES B. McCREARY,
Speaker of the House of Representatives.
EMERY WHITAKER,
pro tem. Speaker of the Senate.

Approved 21 Mar., 1872. P. H. LESTER.

By the Governor:
A. J. JAMES,
60 *Secretary of State.*

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE SECRETARY OF STATE.

I, J. Stoddard Johnston, secretary of State, certify that the foregoing is a true and perfect copy of an act of the General Assembly of the Commonwealth of Kentucky, passed at its December session, 1871, entitled "An act to incorporate the Citizens' Gas-Light Company of Louisville," as appears from the original enrolled bill on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office, this first day of September, A. D. eighteen hundred and seventy-six, and in the 85th year of the Commonwealth.

[SEAL.] J. STODDARD JOHNSTON,
Secretary of State.

61 Upon the filing of the petition herein, summons and 9 copies issued, upon which the marshal made the following return:

Summons.

Executed October 14th, 1879, on the Louisville Gas Company by delivering a copy of the within summons to Henry Whitestone, president of said company; also October 14th, 1879, on Henry Whitestone in his own right, and on W. C. Hite, and on W. G. Anderson, and on Geo. Mulliken, and on Geo. W. Morris, and on S. L. Barrett, all this same day, and October 15th, 1879, on Isaac Wolf, by delivering each of them a copy of the within summons.

C. C. W. ALFRIEND, *M. L. C. C.*,
By W. H. NEWHALL, *D. M.*

Executed October 24th, 1879, on C. P. Moorman by delivering him a copy of the within summons.

C. C. W. ALFRIEND, *M. L. C. C.*,
By C. G. MINOR, *D. M.*

62 And at a court held for the court aforesaid on the 4th day of November, 1879:

Order—Note filing Ans.

Came defendants by Goodloe, Roberts, and Humphrey, counsel, and filed there answer herein.

Which answer is in words and figures as follows, to wit:

Answer.

The defendants, by way of answer to so much of the petition as they are advised to be material for them to make answer to, say:

They admit the passage of the acts of Feb'y 15th, 1838, and January 31st, 1842, and that by said first act the incorporation chartertered thereby was to have an existence of thirty years, and that said thirty years expired January 1, 1869, but they deny that upon that day said corporation ended or expired, and they deny that the powers, rights, or franchises conferred upon said corporation by its said charter have ever ceased of come to an end. They deny
63 that on or soon after January 22nd, 1869, or some time after such alleged expiration of said corporation, or at any time "several," or any persons combined together to organize and carry on the gas business in Louisville, Kentucky, or became jointly interested therein, or assumed the name and style of "The Louisville Gas Company," or purchased or claim to purchase much or any of the effects of said defunct corporation of 1838, or that they have been making or selling gas in or throughout said city or Portland or said adjacent territory. At all of the times last above mentioned there has existed in Louisville, Ky., a corporation which is the first named defendant herein, and it and none other has had the name of the Louisville Gas Company, and has owned all of the effects of the corporation chartered in 1838, and has been making and
64 selling gas in and throughout the said city to Portland.

They deny that said persons at said or any time pretended to organize as a corporation, or have since "pretended," to be a corporation, or to conduct their business as such under any pretended act of the General Assembly of this Commonwealth, or any pretended amendment, or both.

The history of the said Louisville Gas Company, and of the relation thereto of said acts, both of which are, and have ever since their passage been, valid and binding laws of this Commonwealth, will be more fully and particularly hereinafter stated.

They deny that the second section of said act of Jan'y 30, 1867, is as plaintiff has set it out, or that it provides that the individuals, natural or corporate, "who should subscribe for its said stock,"
65 should be created a body politic and corporate, &c. Said words "who should subscribe for its said stock" are not in said section, and defendants refer to and reply on said act to correct any misstatement of its.

They deny that the said fourth section is correctly set forth, or

that it contains the words "thereby created," and they refer to said act for its terms.

They deny that the statement of plaintiff, as to what is contained in the 11th section of said act, is true, either in language, substance, or effect.

They admit that the 5th section of the act of January 22nd, 1869, contains substantially what plaintiff has alleged, but it also contains more, as will be set out hereinafter.

They deny that since said January 22nd, 1869, said persons
66 so engaged in conducting said gas business have been appointing persons to act as managers of said business for them all, which persons have been pretending to be directors of said corporation. The persons authorized by law to elect directors in the Louisville Gas Company have, during the time mentioned in the petition, so done, and the present directors of said corporation are with the addition of J. M. Monohan the persons named in the petition.

They deny that said act of March 21st, 1872, is now in full force or at all in force, or that the plaintiff has organized further than is hereinafter admitted, or that it is ready to carry on business thereunder. As to whether the plaintiff has correct set forth the terms of the various sections of said act of March 21, 1872, which
67 it quotes from said act will show, but they deny that by said act any authority whatever was granted to plaintiff to sell any stock.

Defendants deny that the general council of the city of Louisville has consented that the plaintiff may "establish a gas works, or lay down its mains or pipes in and along the streets, alleys, and public ways of the city," or make such other connections and arrangements as might be needed for the supply of gas, &c., or for the period of 12 years from 13th December, 1877, said general council did pass an ordinance in reference to plaintiff, the terms and effect of which defendants will state hereinafter. Defendants deny that plaintiff has the right or franchise to sell any of said stock, or to establish or operate a gas works in the city of Louisville, or to lay mains or pipes in the streets, alleys, or public ways of
68 said city, or to lay mains and pipes in the *in the* streets, alleys, highways, lanes, or other public places, in what it calls Portland, but which is really only a part of the city of Louisville, or to make, sell, or supply coal-gas for lighting the public and private buildings of said localities.

They deny that the acts of January 30th, 1867, and January 22nd, 1869, are void or of no effect, or that either of them is void or of no effect, or that they did not create or confere the rights and privileges which they purport to do, or that in any part they or either of them are invalid.

They deny that the titles of said acts falsely pretend that the subject of the said acts was to extend the charter and company of 1838, and they traverse the plaintiff's argument on this point and every part of it, and say that its legal conclusion is untrue, and
69 said acts and their titles relied on as a full and complete answer to said argument, and they deny that said acts or either of

them are or were in violation of the constitution of the State of Kentucky or void or a nullity in law, or that the corporation which is the first named defendant is not a corporation, or that it has not all the rights which said acts purport to confer.

They state that said corporation, The Louisville Gas Company, did undertake to perform, and has performed, very valuable public services, and they deny that the said acts to the extent that they purport to grant exclusive privileges to said corporation were in violation to the constitution of Kentucky, and they deny that said acts or either of them are void, or that they or either of them
70 are of no legal effect, or that they or either of them grant any exclusive privilege not in consideration of public service.

They deny that said act of January 22nd, 1869, was ever subject to repeal, except as hereinafter stated, or that it, or said act of Jan. 30th, 1867, was an unreasonable monopoly, or a monopoly at all in any sense contrary to public policy and law, or a restraint upon trade, or in derogation of public policy or interests, or contrary in any way to the welfare of the city or its citizens, or that it created a public nuisance, or that the inhabitants of said city, or any of them, have, by the absence of competition, been annoyed or oppressed, or that there have been extortionate charges for inferior gas, or that the charter of said corporation has been repealed in any way,
71 or that its exclusive privileges have been ended, and they state that said privileges have existed since, as before, the act of March 21, 1872, and against the plaintiff and all others.

Defendants state that if the plaintiff has any power to establish a gas-works, it must be such as is contemplated in its charter, and that will be "public works," in the same sense that the works of defendant, the Louisville Gas Company, are public.

It is true that, in the charter and management of the Louisville Gas Company, the public interest is recognized, guarded, and conserved, while the sole object of plaintiff's existence is that of a private money-making enterprise, without regard to anything else; but defendants submit to the court that there could not be a more
72 reason given for the interference on plaintiff's behalf of this court.

They deny that they have at any time before or after the incorporation of plaintiff, wrongfully or falsely asserted, pretended or claimed publicly, openly, or to any the exclusive privilege of establishing and operating a gas-works, &c., or that they are now publicly and openly asserting the same, except as hereinafter stated, and that they threaten at all to continue such assertions, except as the declaration hereinafter set out to defend their rights, may be considered such a threat, or that they have been wrongfully or falsely asserting, claiming or pretending publicly, openly, or at all, further than is hereinafter stated, that the plaintiff has not the rights set forth by it, or that they threaten to continue to assert, pretend or claim, further than an assertion of their rights as hereinafter set forth, be
73 called such a threat. Defendants states that they have the exclusive privilege set forth hereinafter, and have the right

to, and expect to defend the same, that its existence has not been in any way concealed, that they have in no wrongful way asserted it, and that there has been no occasion to threaten anybody with it, nor even the plaintiff, which is, at last and at most, a corporation without capital or credit, which has never made a movement towards laying an inch of pipe or manufacturing a foot of gas.

They deny that plaintiff has any right to sell its stock to any one, or that such is the usual means of raising the funds necessary to carry on a corporation.

They deny that plaintiff ever had the right to lay said pipes or mains, or to carry on said gas business in said localties, or
74 any of them, they deny that it has been or is ready or anxious to begin on a large or small scale the erection of a suitable gas-works, or the other necessary buildings and machinery, or the laying of pipes. They do not know, nor have they knowledge or information sufficient to form a belief, that if plaintiff had not been obstructed or prevented it would have been able to sell, or would have sold, large amounts of stock, or sufficient to have established its business, or would have established gas-works or laid pipes.

They deny that they have in any way unlawfully obstructed plaintiff, or obstructed it at all, except so far as it may have been hindered by the failure of defendants to surrender rights con-
75 ferred on the Louisville Gas Company long before the act of March 21, 1872; but even if this hindrance had been out of the way, they deny that plaintiff would have made any profit or would now or hereafter have business and good will of great or any value or profit, or that they would have sold gas at either reasonable or proper prices.

They deny that it is of any importance whatever to the city or citizens of Louisville that the plaintiff be enabled to sell its stock, or to raise means in any way, or to begin or complete its works, or to establish or conduct its said business.

They deny that plaintiff has lost any time by reason of any wrongful act of any of them, or on account of any cloud on its title.

They deny that the value of its franchises has been depre-
76 ciated, or is being daily lessened, or that plaintiff is losing any advantages or profits it would make.

They deny that the Louisville Gas Company has been guilty of oppressions or irregularities, or has supplied inferior gas, or charged exorbitantly therefor.

They deny that there is a demand for another competing gas company, or that such a thing is possible in the nature of things, or that it is necessary for the public interests of the city or its citizens.

They deny that in the absence of any acts of theirs, wrongful or not, and they deny that they have been guilty of any wrongful acts in the premises, the plaintiff would be able to sell its stock or to establish its business or be able to or would make better gas
77 than the Louisville Gas Company makes or sell it at a reasonable price or at a price less than said company sells its gas, or that the plaintiff would obtain or make any profit thereby.

They deny that the plaintiff has correctly set forth the terms of the ordinance referred to.

They deny that the plaintiff's liability to invest $75,000 in two years was limited by the language "if practicable."

They deny that plaintiff has been ready or anxious to perform the undertaking of said ordinance. They deny that plaintiff suffers any loss by being prevented from selling its stock.

They deny that if defendants are enjoined as prayed for, plaintiff will be enabled to comply witht he said undertakings, or thereby the court will prevent great loss and injury to it. They deny
78 that they have made any false or wrongful pretentions. They deny that anything they have done, or are doing, is the only thing which prevents plaintiff from selling its stock. If entirely relieved of defendants, and valid and just rights, they deny that even then plaintiff would be able to establish or operate a gas-works or to lay pipes or to sell gas in said localities. They deny that they have made any claims or pretentions which were not simply in reference to and a defense of an assault upon their just rigths. They deny that such claims as they do make *them* are made for the purpose of clouding or impairing or destroying the worthless title of a merely speculative and paper corporation, such as is the plain-
79 tiff, or to throw any additional cloud upon its said title.

They deny that they have done anything which will injure the credit of plaintiff, because the plaintiff has no credit. They deny that have impeded or defeated any effort of plaintiff to sell its stock, construct or operate a gas-works, lay pipes, sell or supply gas, or that it has ever made any of these things.

The defendants deny that they have threatened to prevent the plaintiff from laying its pipes in the streets, alleys, and other public places of said city, because among other reasons said plaintiff has never shown any intention or ability so to do, and the same is true of any future threats of these defendants. They deny that any damage has been done to plaintiff, or that there have been any unfounded pretentions or wrongful acts on the part of these
80 defendants in the premises, and they deny that said plaintiff has or will suffer any great or irreparable damage, or any damage, if this court refuses the relief prayed by it.

And further answering, defendants state that by virtue of sundry acts of the Legislature of Virginia, while the territory now forming the State of Kentucky was a part of Virginia, the town (now city) of Louisville was created, and there was vested in it in fee simple the following-described tract of land, containing one thousand acres, to wit, beginning at a hoop ash and buckeye on bank of the Ohio river about 35 poles above the mouth of Beargrass; thence S. 83 degrees, W. 35 poles; thence N. 87 degrees, W. 120 poles; thence N. 50, W. 90 poles, said three corners being along the river; thence S.
81 43 degrees, W. 462 poles to a black oak, sugar tree, and buckeye; thence S. 88 degrees, east 769 poles to a corner with Preston, a black oak and sugar tree; thence N. 37 degrees, W. 390 poles to the beginning. And by virtue of said grant said city now owns, and at the various times hereinafter referred to owned, the fee

in the various streets, alleys, lanes, and highways laid out by it in said territory. And the defendants further state that theretofore, to wit, on February 15th, 1838, there was passed an act of the Legislature of the State of Kentucky incorporating a company under the name of the Louisville Gas and Water Company, the intent and object of which was to form a company to erect a gas-works and a water-works
82 in the city of Louisville for the purpose of supplying gas and water to said city and to its citizens. Said act was afterwards so amended as to change the name of said company to the Louisville Gas Company, and to take away its privileges to erect a water-works. Under said act, a corporation was duly organized, and among other stock-holders was the city of Louisville. By the terms of said charter it was to continue in existence for thirty years from Jan. 1, 1839, and power was thereby granted to said corporation to erect a gas-works in said city, to vend gas and to lay its pipes for the purpose of conducting the same through any of the streets and alleys of said city. By the said charter as amended the stock of said corporation was fixed at twelve thousand shares of fifty dollars each. The said corporation proceeded at once to
83 erect a gas-works, and all suitable buildings and machinery, and to supply itself with all necessary apparatus, and to lay down mains and pipes to conduct the said gas through the streets of the said city, and to erect lamp-posts for the purpose of lighting the said streets.

And defendants state that said corporation did vend gas to the citizens of the said city, and did supply the public buildings and street-lights of said city with gas.

By the 18th section of said charter, said city was granted the privilege of purchasing said gas-works at the termination of said charter. By an act of the legislature of Kentucky, approved January 30th, 1867, entitled "An act to extend the charter of the Louisville Gas Company," it was provided among other things that
84 "the following charter be granted to the present Louisville Gas Company to take effect at the expiration of the present charter, on the 1st day of January, 1869, provided the city of Louisville does not exercise the privilege to purchase the same in accordance with terms set forth in Article 18th of the present charter."

By the second section it was provided "that a company should be and was thereby incorporated with a capital of $1,500,000, to be divided into shares of $50 each, to be owned by individual companies and corporations, and that they and their successors and assigns should be and were thereby created a body politic and corporate by the name of the Louisville Gas Company, and should so continue for 20 years from January 1, 1869.

85 By the third section of said act it was provided that the capital stock of $1,500,000 should consist, "first, of the stock of the present Louisville Gas Company, on the 31st of December, 1868, at par value; secondly, of the contingent fund and undivided profits that the Company may own at the expiration of the present charter, said fund to be capitalized *pro rata* for the benefit of the present stockholders, except fractional shares which shall be paid in

cash; and thirdly, new stock may be issued and sold by the new company when required to the extent of the capital stock, the sales to be made at public auction, after ten days' notice in the city papers; should said stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale
86 of said stock."

By the fourth section it was provided that the business of said company should be to make and furnish gas to the city of Louisville and residents thereof and vend the same.

By the fifth section it was provided that the Gas Company should, within two years after said charter took effect, be required to extend the gas distribution to Portland and lay down street mains through certain named streets in that part of the city, including the erection of street lights.

By section six it was provided that said company should be bound to extend their street mains whenever the private and public lights would pay 8 per cent. on the cost of such extension, until their whole capital should be absorbed in the gas-works and
87 extensions.

By the seventh section it was authorized to continue the use of the pipes and conductors which had been laid down, and, with the consent of the city council, to extend the pipes and conductors through the other streets and alleys of said city.

By the eighth section it was provided that said company should put up gas-lamps at certain distances apart on the streets where there were mains, and to supply the same with gas and light and extinguish the same, and to charge and receive therefor from the city of Louisville only the actual cost thereof, which charges were not to exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St.
88 Louis, and that the price charged other consumers of gas should not be greater than the average price of gas charged such consumers in said cities.

By section eleven it was provided that the stockholders, exclusive of the city of Louisville, should elect five directors and the general council of said city four directors.

By section nineteen it was provided that the city of Louisville, if it so elected, might purchase the gas-works at the termination of this charter at a fair estimation of what said works should then be worth.

By the twentieth section it was provided that "this charter was to be valid and in full force when accepted by those who hold the majority of the shares of stock in the present Gas Company, and the new company shall become successors to, and owners of, all real estate and other property belonging to the old company.

89 Defendants further state that, by a resolution of the general council of the city of Louisville, approved by the mayor December, 1868, said city declined the option allowed to it by the 18th section of the act of Feb. 15th, 1838, to purchase said gas-works. A duly certified copy of said resolution is filed herewith as

part hereof, marked Ex. —— At that time the city of Louisville was very largely interested in the stock of said Louisville Gas Company, owning 4,985 shares thereof, and all of its streets which were lighted at all were lighted by said company, and the gas sold to its citizens was supplied entirely by said company. As the charter of 1838 was about to expire said city, both on its own part, as well as in the interest & for the protection of its citizens, considered
90 it not only its right but its duty to enquire into, and, if possible, agree upon the terms of any acts to go into effect on the expiration of said act of 1838.

Thereupon a conference was invited and granted, and duly took place between the board of directors of said Gas Company and the General Council of said city, through a committee duly appointed by each of its boards. After full consideration of the whole matter, it was mutually agreed between said company, through its board of directors, on the one part, and said committee upon the other part, that said city and said company should jointly apply to the Legislature of the State of Kentucky to amend said act of January 30th, 1867, in the particulars hereinafter set forth. Thereupon said
91 committee reported its actions to said boards with a draft of such amendatory act, and the action of said committee was ratified, and said proposed amendatory act was thereupon approved by resolution of both of said boards, which was approved by the mayor of said city on December, 1868. Defendants filed herewith, as part hereof, a duly certified copy of said proceedings of said General Council of the report of said committee, and the resolution so adopted.

Thereupon, at the joint request of said company and said city of Louisville, the Legislature of the State of Kentucky passed the act referred to in the petition herein, which was approved January 22, 1869, and is the same so agreed upon as aforesaid. Said act provided by it first section for an immaterial change in the 2nd
92 section of said extended charter.

And it provided by its second section that the Gas Company should be bound to extend its main pipes, whenever the public and private lights immediately arising from said extension should pay seven (7) per cent. profit on the cost thereof, and so much of the fifth section of said extended charter as required a profit of 8 per cent. on the cost of an extension, was thereby repealed.

And it provided by its third section that said Gas Company should put lamp-posts along the street mains at certain distances, and furnish gas, light and extinguish the same, and that said public lights should be furnished the city at actual cost, but in no event to
93 exceed $35 per lamp, and the charge for gas to private consumers should be so graded as that the company's profits should not exceed twelve per cent. per annum on the par value of the stock, ten per cent. of which might be drawn by the stockholders in semi-annual dividends, and the other two per cent. to be laid out for extensions, and not to be capitalized except at the end of every five years; and that section seven of said extended charter be repealed.

By the fourth section a certain provision was made in reference to the stock of said city.

By the fifth section it was provided that said Gas Company should have the exclusive privilege of erecting and establishing gas-works in the city of Louisville, during the continuation of this char-
94 ter, and of vending coal-gas lights, and supplying the city and citizens with gas, by means of public works, provided, however, this shall not interfere with the right or anyone to erect or cause to be erected gas-works on their own premises for supplying themselves with light.

By the sixth section it was provided that no alteration or amendment to the charter of the Gas Company should be made without the concurrence of the city council and the directors of the Gas Company.

Both of said acts, to wit, that of January 30, 1867, and that of January 22, 1869, were in accordance with sec. 20 of the act of January 30, 1867, providing that it should be "in full force when accepted by those who hold the majority of the shares of stock in the pres-
95 ent Gas Company," duly accepted by all of said stockholders, and said stock, with the contingent fund and undivided profits, was capitalized at one million of dollars, and the same stockholders of the Louisville Gas Company continued to be the stockholders in the corporation which is the first-named defendant herein.

And defendants state that at the time said acts of January 30, 1867, and January 22, 1869, took effect, said Louisville Gas Company had already rendered public services more than commensurate with the privileges granted said act.

Under the act of Feb. 15, 1838, said city of Louisville subscribed for 2,000 shares of stock, and in payment therefor delivered to said company its bonds for $2,000,000 at thirty years, bearing interest, payable semi-annually, at 6 per cent.

96 By virtue of the act of January 31, 1842, the shares were reduced to $50 each, said Gas Company delivered up to said city 1,000,000 of said bonds. Under said act of Feb. 15, 1838, and by virtue of sundry agreements and arrangements with the city, the dividends upon its stock were used, (1), to pay the interest on said bonds; (2,) to pay for another two thousand shares of stock, and finally, said bonds themselves, and to accumulate a trust fund to aid said city in purchasing said works, said city having declined to purchase said works, when the stock and contingent fund and undivided profits were capitalized in 1869, there was issued to said city, as its stock, eight thousand three hundred and seven shares
97 being at par equal to $415,350, and there was a further credit to it of $158,849.76, on the books of said company as a trust fund, for none of which either stock in trust fund, said city of Louisville had paid one dollar, the whole of it having arisen from dividends.

And said corporation as a further and additional consideration for the benefits and privileges conferred by the said two acts, including the exclusive privilege so granted the said corporation became

bound to perform very valuable public services, both to said city and to its citizens, and among other the following:

I. To extend its street mains to that district of the city called Portland, within two years from January 1st, 1869.

II. To erect lamp-posts along the streets upon which its
98 mains should be laid at a distance apart of two hundred feet, and where mains were on both sides of the street to erect a like number as above connecting with each main.

III. To supply all the street lamps with gas, to light and extinguish the same, and to charge for such gas and service only the actual cost, and no more than $35 per lamp in any event.

IV. To extend its street mains whenever 7 per cent. profit could be received on the cost of such extension.

V. To limit the price of gas supplied to the private consumer to a price which would not pay profit of more than twelve (12) per cent., leaving the other two per cent. to be laid out for extensions, and in order to confirm and make sure to said city and the public
99 all of the said obligations, the said charter was made incapable of alteration or amendment except with consent of the city council, as well as the directors of said Gas Company.

And defendants state that fully trusting in the terms of said acts, and in the valid and binding nature of the contract thereby evidenced and created, said Louisville Gas Company has continued up to this time, and will continue to the end of said term, to faithfully perform all the duties and obligations imposed by said acts, and in order to be able so to do have in addition to said capital of one million dollars, which its property and works were worth on January 22, 1869, invested in the extension and betterment of the same an additional sum of at least five hundred thousand dollars, and have become both in works for
100 making, and pipes for distributing, gas, a thoroughly equipped gas company, with the readiness, desire, and ability to supply all public and private wants in this city. Defendants state that, within less than the time limited, said Louisville Gas Company had completed its extension of its mains to that district of said city called Portland, and erected a large gas-holder for that part of town. Said extension was with the consent of said city, under an agreement made in the winter of 1867–'8, paid for out of said city's trust fund; but there was issued to said city stock therefor to the amount of $188,750 at par, this being a large bonus over the amount so used, said Gas Company computing said stock on the basis of the
101 capitalization of January, 1869, and giving said city all the advantage thereof. Upon this said city has received the said dividend as the *the* company paid on the other stock, although the investment has never yielded two per cent. in any year.

It has erected a large number of lamp posts, and done so whenever and wherever required by said 3rd section of the amendment.

It has supplied, lighted, and extinguished said lamps at cost, although the amount of gas which is consumed thereby is about two-fifths of all that said defendant makes.

It has extended its mains always when it could receive 7 per cent. on the cost of such extension, and in many cases where it received less.

It has reduced the price of gas to private consumers from
102 time to time, so as to keep within its limits of profit, and has made even less profit than said charter allowed.

And defendants state that said stock of said city, for which as above stated it did not pay one dollar, is now equal at par to $640,350, being 12,807 shares, and said city has besides this a large trust fund in the hands of said company for the purchase of the works at the end of the present term of the existence of said corporation.

And defendants state that up to the year 1869 said city was compelled to levy and collect a tax to light its streets, but that since then it has, by applying its dividends to that purpose, been enabled to avoid the necessity of levying any tax whatever for such purposes.

103 And defendants say that except for the grant and continuance of such exclusive privilege, it would not be able to perform the said public services.

And defendant further states that said agreement with said city and said acts constitute a tripartite contract between the Louisville Gas Company, the State of Kentucky, and the city of Louisville, based on the above-mentioned good and valuable considerations by which there was secured to said Louisville Gas Company for the full term of twenty years from January 1st, 1869, the said exclusive privilege of erecting and establishing gas-works in the city of Louisville, and of vending coal-gas lights, and supplying the city and citizens with gas by means of public works, with the excep-
104 tion that it cannot interfere with the right of any one to erect or cause to be erected gas-works on their own premises for supplying themselves with light. And said exclusive privilege is inviolable and cannot be lessened or in any way impaired by the State of Kentucky, or the city of Louisville, or both combined, and the act incorporating plaintiff, and the ordinance in reference thereto, so far as either of them assume to grant to the plaintiff any privilege or franchise to erect a gas-works in the city of Louisville or to vend coal-gas therein, or to supply said city or citizens with gas, or to lay its mains or pipes in the streets, alleys, highways, or lanes of said city, or any other privilege or franchise in derogation of said exclusive right, in whole or in part, are null and void.

105 And defendant further states that to allow the plaintiff to interfere with said exclusive right would be greatly to the detriment of the city of Louisville and its citizens; that it is a fact which was well known and fully considered by all persons, including the city authorities, before the passage of the act of January 22nd, 1869, and before the same was agreed upon, that the manufacture and distribution of gas must of necessity be a monopoly that is not subject to competition; that the great expense in the use of gas lies in the cost of the machinery which produces it, and even more especially in the great expense necessary for its distribution; that to have two

separate agencies to accomplish a task which one is competent
106 to perform doubles the expense without increasing the profit or efficiency. It was greatly to be preferred by said city and its citizens that there should be one company in the charter, of which the rights of said city and its citizens were properly guarded and protected, rather than to have several companies who would be free to exact whatever they could get from the citizens, be compelled to render no public service, and, by having an aggregate investment greatly larger than an amount necessary for the simple purpose, be under the necessity of charging greatly increased prices to obtain an adequate return, or, after engaging in a fruitless contest, finally combined to make good the loss.

And defendants further state that the cost of supplying gas
107 per foot to parts of the city where there are few consumers is, of course, much greater than the same in to parts where the consumers are numerous, and an additional reason for allowing said exclusive privilege was to prevent a rival company from laying its pipes in the thickly-settled parts of the city, thus requiring a heavier exaction from the more remote quarters. Under the regulations of defendants' company gas is supplied to all the citizens near and remote at a uniform price.

And defendants further state that the arrangement hereinbefore set out was entered into after full deliberation and consideration by all parties interested, and to now interfere with it would be
108 violation of good faith, and detrimental to the interests of all the parties thereto, including said city and its citizens.

And defendants further state that the charter under which plaintiff claims its existence was granted March 21, 1872, more than seven years ago, that a quorum of the corporators shortly thereafter, to wit, before June, 1872, accepted said charter and made the preliminary organization contemplated by it, and elected a board of directors.

But defendants state that by the terms of said charter it was expressly provided that the capital stock should consist of $750,000, and that the whole of it should be paid in within two years from the organization of the company under the charter.

And until said stock was paid in, the only means provided by said charter for said corporation to raise money was by the
109 subscription and payment for stock therein; and defendants say it became and was the duty of said corporators within a reasonable time after said organization to invite subscriptions of stock, &c., that the same might be paid in the time required and the functions of said corporator would, after such subscription have ceased; but defendants say that no subscriptions have ever been invited and no stock has ever been subscribed or paid in.

And defendants state that nothing further was done towards completing the legal existence of said corporation, but the said organization was abandoned and said board of directors ceased to exercise their offices, and the same became and were vacated. More than five years thereafter, to wit, in 1877, a portion of said corpor-

110 ation illegally and without warrant of law assumed to make a new organization of said corporation and elect other directors, but the said action was entirely void.

These were the same persons who assumed to compose the directory of said corporation, December 13th, 1877, afterwards, to wit, in the year 1878, said second organization was abandoned and a third attempted to be made by the elections of the persons pretending to be said board of directors; and defendants state that said plaintiff is without any legal organization of any kind; that the person, W. N. Haldeman, assuming to act as its president, is not such, and those assuming to be its directors are not such, nor is any one of them.

And said corporation has no existence whatever, and was on 111 said Dec. 13, 1877, incapable of receiving any grant, and is now incapable of maintaining this action, and has ceased to exist, and had so ceased long before Dec. 13, 1877.

And defendants further state that is impossible, in the nature of the case, to vend and supply gas without laying pipes to conduct it from the place of manufacture to the points where it is consumed, and that the only authority said plaintiff has to lay its mains and pipes in any place where this defendant claims or has ever claimed any exclusive right, to wit, in the city of Louisville, is, by its charter, made dependent upon its first obtaining the consent of the general council of said city. And defendants say that said general 112 council have no right to give any such consent until the expiration of the charter of said Louisville Gas Company, and the only consent plaintiff has, or claims to have, is derived from the ordinance referred to by it in its petition, which is the ordinance which took effect Dec. 13, 1877, and which is filed herewith as part hereof, marked Ex. XX.

The title of said ordinance is as follows:

"An ordinance granting the right to the Citizens' Gas Light Company of Louisville to establish a gas-works, and lay down its pipes and mains, in and along the streets, alleys, and public ways of said city, so far as the general council has the legal right to grant the same."

By the first section of said ordinance, it was ordained that the Citizens' Gas Light Company be, and is hereby, granted the 113 right, so far as the city of Louisville has the legal right so to do, to establish a gas-works, and lay down its pipes and mains, in and along the streets, alleys, and public ways of the city, for the supply of gas to the citizens or city for a period of twelve years from the date of the passage of this ordinance, upon the following express conditions:

The ninth condition in part was, that said company should proceed as rapidly as practicable to establish its works and lay down its pipes and mains after the passage of this ordinance, provided the said company should have erected its gas-works, laid down its mains, and be prepared to supply its citizens with gas within two years after the approval of the ordinance.

The tenth condition was, that for the faithful performance
114 of all the provisions of this ordinance, the Citizens' Gas Light Company should execute a bond with good security to the amount of $75,000, to be approved by the mayor and general council; and, further, that within two years there should be an investment made by said company in works and mains equal to the sum of $700,000.

And said ninth condition also contained the following:

"This ordinance and all rights and privileges granted thereunder shall be null and void should said company fail to keep and perform each and every provision of this ordinance in each and every particular."

Now defendants say that said consent is in no way sufficient, and cannot form any basis of claim on the part of the plaintiff,
115 because said ordinance only purports to grant such consent so far as said city has the legal right to do; and it had not the legal right to do so at all, because said plaintiff has not proceeded as rapidly as practicable to establish its works and lay down its pipes and mains, but, to the contrary, has utterly failed to take any step whatever in that direction, and has not in any way begun either to establish said works or lay down said pipes or mains, and because having done nothing to that end it will now be impossible for it to erect its works, lay its mains, and be prepared to supply the citizens with gas within said two years, to wit, before December 13,
116 1879, and it does not intend to do so, or to make any such endeavor or even to begin said work, and because it has entirely failed to execute said bond, and because it has failed to invest $75,000 in works or mains, or both, within said two years, or at all, and has not invested anything in either, and has no intention of so doing, and because by said several failures of said plaintiff to said several provisions of said ordinance the same has become null, void, and of no effect.

And defendants state that the said plaintiff, if it has any existence, only has it on paper: that it has not a dollar of capital or credit; that it has neither means nor authority to preserve any of the ends of its pretended existence.

Wherefore defendants pray that the petition be dismissed,
117 and that these defendants have judgment for their costs and for all proper relief.

J. L. BARRETT,
I. & J. CALDWELL & WINSTON,
BARR, GOODLOE & HUMPHREY,
Att'ys for Defendants.

STATE OF KENTUCKY, }
Jefferson County, } *set:*

Henry Whitestone says that he is president of the Louisville Gas Company, and that the statements contained in the answer are true, as he believes.

HENRY WHITESTONE.

Sworn to before me by Henry Whitestone, this 14 Nov., 1879.
ALEX. P. HUMPHREY, *N. P., J. C.*

Order Pff. File Exhibits.

And at a court held for the court aforesaid, on the 5th day of December, 1879—

Came plaintiff, by counsel, and filed two exhibits herein;
118 which exhibits are in words and figures as follows, to wit:

EXHIBIT.

The committee to whom was referred the subject of purchasing the Louisville gas-works have, as far as practicable, considered the matter.

Your committee found some difficulty in having a quorum together for general consultation, which accounts for the delay in making a report. We have found upon investigation the affairs of the Gas Company in good condition, so far as the city of Louisville's interests are concerned.

The city's interest in the Gas Company on the first of January, 1867, will probably be $5,000,000, as follows: $250,000 in capital stock, about $250,000 in trust fund invested in Portland ex-
119 tension, city's note, &c., &c. This is a good exhibit, and speaks well for the general management of the Gas Company. The amount necessary to be raised to purchase the interest of the private stockholders will be about $7,000,000; of course this will have to be ready cash.

This is a large amount, and without stopping to consider the practicability of any special plan for raising the means to purchase the gas-works, your committee are of the opinion that the purchase is of doubtful policy; involving, as it does, the raising of the very large sum of about $7,000,000, just at this time, it may be seriously questioned whether the city can manage successfully an institution like this, and judging from the information furnished by
120 other cities, it is a hazardous experiment, and instead of being a pecuniary advantage, may only be a political evil.

Upon a close examination of the act of the 9th March, 1868, empowering the city to issue bonds for the purchase of the gas-works, said bonds to be paid off by taxing the people, each tax-payer to have stock in the company for all amounts so paid, your committee are of opinion that this would result in the establishment of a new stock company, with a perpetual franchise, and not governed in any manner by chartered restrictions.

After investigating the material points, as we understand them to be, your committee advises the adoption of the following resolution;

Resolved by the general council of the city of Louisville,
121 That it is of doubtful expediency at this time for the city of

Louisville to become the exclusive owner of the Louisville Gas-Works.

FONTAINE T. FOX, JR.,
Chairman Committee B. A.
W. H. DULANEY,
PHIL. T. GERMAN,
Chairman Committee C. C.
GEO. BROBSTON.
HENRY DENT.
JOHN McATMER.
H. W. WALTON.
C. BANNON, *P. B. C. C.*
JO. H. BUNCE, *P. B. A.*
JOHN M. VAUGHAN, *C. B. C. C.*
OLIVER LUCAS, *C. B. A.*

Approved December 14, 1868.

PHILIP TOMPPERT, *Mayor.*

A true copy from the original record.
Attest: JNO. G. BAXTER, *Mayor.*

MAYOR'S OFFICE, LOUISVILLE, KY., *Dec. 7th*, 1868.

To the GENERAL COUNCIL:

122 GENTLEMEN: I herewith return approved a report and resolution of your committee on the subject of the purchase of the gas-works, which passed your honorable body with but one dissenting voice. I fully concur with your hon. body in the resolution that it is expedient for the city to purchase the gas-works.

I would suggest that your hon. body might consult with the Gas Company touching certain matters relating to the rate charged for gas furnished consumers, with a view to arriving at a satisfactory conclusion thereto.

Respectfully, PHILIP TOMPPERT, *Mayor.*

A true copy from the original record.
Attest: JOHN G. BAXTER, *Mayor.*

123 At a session of the board of common councilmen of the city of Louisville, held at their chamber, corner of Sixth and Jefferson streets, on Wednesday evening, December 23rd, 1868.

Present: Mr. Pat. Bannon, president, and all the members, except Mr. Daniel.

Mr. Long presented a resolution raising a committee of one from the board of aldermen and two from the common council to wait upon the Gas Company to secure such pledges and guarantees as will induce the Legislature to so amend the new charter of the Gas Company as to give to the city the right to select her directors without a stock qualification, and to regulate the dividends so that they shall not exceed 10 or 12 per cent.

Mr. Baxter presented, as a substitute therefor, a resolution
124 raising a committee of two from the board of aldermen and three from the common council to wait upon the Gas Company and report what amendments the company propose to ask the Legislature to enact, and directing the mayor to convene the council this year to consider the same.

Mr. Duerson moved to take the substitute, which motion was lost by the following vote:

Yeas—Messrs. Duerson, Loeser, Long, and Vissman, 4. Nays—President Bannon and Messrs. Brobston, Coke, Downs, German, Pope, Heing, Jenkins, La Rue, McAteer, Miller, Baxter, O'Conner, Robinson, Walton, Dent, and Walling, 17.

When, on motion, Mr. Baxter's substitute was adopted, and Messrs. Baxter, Long, and Walling were appointed said committee.

A copy.
Attest: L. R. McCLEERY, *C. B. C.*

125 A true copy from the original record.
Attest: JOHN G. BAXTER, *Mayor.*

At a meeting of the board of aldermen of the city of Louisville, held at their chamber, corner 6th and Jefferson streets, on Wednesday evening, December 23, 1868, the following members were present:

Capt. J. H. Bunce, president, and member from the 12th ward.
From the 1st ward, Mr. ——.
" " 2nd " " Wm. F. Rubel.
" " 3d " " ——.
" " 4th " " W. E. Gilpin.
" " 5th " " ——.
" " 6th " " C. P. Rudd.
" " 7th " " F. T. Fox.
" " 8th " " Jno. E. Crowe.
" " 9th " " W. H. Dulaney.
" " 10th " " Jno. C. Gies.
" " 11th " " R. B. Sheridan.
" " 12th " " J. H. Bunce.

126 A common council resolution was adopted raising a committee to report certain amendments to the charter of the Louisville Gas Company, and Messrs. Gies and Crowe were appointed said committee from this board.

A copy.
Att.: OLIVER LUCAS, *C. B. A.*

A true copy from the original record.
Attest: JNO. B. BAXTER, *Mayor.*

At a called session of the general council of the city of Louisville, held at their chamber, corner of Sixth and Jefferson streets, on Wednesday evening, December 30, 1868—present, Mr. Pat. Bannon,

president, and all the members, except Messrs. Daniels, Downs, and McAteer—a message was read from the mayor stating that he had convened the general council in order to receive the report of the special committee on the gas charter amendments, and re-
127 questing the appointment of a committee to confer with a committee of the Legislature in regard to the removal of the State capitol, which was received and filed.

Mr. Baxter, from special committee, submitted a report as agreed upon by the Gas Company, recommending sundry amendments to the charter of the Gas Company, with a resolution requesting our representatives to urge the passage of same, which report and resolution were adopted.

A copy.
Att.: L. R. McCLEERY, *C. B. C.*

A true copy from the original record.
Attest: JNO. G. BAXTER, *Mayor.*

At a meeting of the board of aldermen of the city of Louisville, held at their chamber, corner 6th and Jefferson streets, pursuant to a call from the mayor, the following members were present:

Capt. J. H. Bunce, president, and member from 12th ward.
From the first ward, Mr. John W. Story.
128 From the 2nd ward, Mr. ———.
" " 3rd " " ———.
From the 4th ward, Mr. ———.
" " 5th " " S. L. Barrett.
" " 6th " " C. P. Rudd.
" " 7th " " F. T. Fox.
" " 8th " " John E. Crowe.
" " 9th " " W. H. Dulaney.
" " 10th " " John G. Gies.
" " 11th " " R. P. Sheridan.
" " 12th " " J. H. Bunce.

A message was received from the mayor stating that the object of calling the council together was to consider the report of a committee appointed to prepare certain amendments to the present charter of the Louisville Gas Company, which was ordered to be filed.

The report of the committee appointed to prepare amendments to the charter of the Gas Company was submitted, with a resolution praying the General Assembly to enact certain amendments,
129 which was adopted by the following vote:

Yeas: President Bunce, and Messrs. Story, Barrett, Fox, Crowe, and Dulaney—6.

Nays: Messrs. Gies and Sheridan—2.

A copy.
Att.: OLIVER LUCAS, *C. B. A.*

A true copy of the original record.
Attest: JOHN G. BAXTER, *Mayor.*

Resolved by the general council, That a committee of three from this board and two from the board of aldermen be appointed to ascertain from the directors of the Gas Company what amendments they propose to ask of the Legislature, and report the general amendment to the general council, and report what the city ought to do in regard to the purchase of the gas-works, and the mayor is hereby directed to convence the council this year.

P. BANNON, *P. B. C. C.*
JO. H. BUNCE, *P. B. A.*
J. M. VAUGHAN, *C. B. C. C.*
OLIVER LUCAS, *C. B. A.*

Approved Dec. 26th, 1868.

130 PHILIP TOMPERT, *Mayor.*

A true copy from the original record.
Attest: JNO. G. BAXTER, *Mayor.*

MAYOR'S OFFICE, LOUISVILLE, KY., *Dec. 30th*, 1868.

To the GENERAL COUNCIL.

GENTLEMEN: In obedience to a resolution passed by your honorable body, at your last meeting, directing me to convene the council, you are hereby convened in order to receive the report of the committee on gas, and the amendment to the new gas charter before the expiration of the present year. I would further recommend the appointment of a committee to see what arrangements can be made in regard to the capitol to our city, as that question will be before the Legislature this winter, and if you would have it, we must act in time.

131 Respectfully, PHILIP TOMPERT, *Mayor.*

A true copy from the original record.
Attest: JNO. G. BAXTER, *Mayor.*

To the GENERAL COUNCIL.

GENTLEMEN: Your committee appointed to confer with the directors of the Gas Company, to ascertain if some amendments to the charter of the Gas Company could be agreed upon to more fully protect the private consumer, in the price of gas—

Would respectfully submit the following amendments which have been agreed upon by the directors and your committee; your committee believe that when the Legislature have adopted the proposed amendments, our city and citizens will be fully protected in the future.

Your committee would add, that the president of the Gas
132 Company expressed a willingness to do everything in his power to have the charter so amended, that our city and citizens would receive mutual and ample protection.

We therefore submit the following resolution, and ask that it may be adopted.

JOHN G. BAXTER.
GEO. H. WALLING.
CHARLES R. LONG.
JOHN C. GIES.
JOHN E. CROWE.

Resolved by the general council, That our senators and representatives in the General Assembly be requested to have the charter of the Louisville Gas Co. so amended as to incorporate the accompanying amendments, agreed upon and submitted by the directors of the Gas Co. and the General Council of the city of Louisville.

P. BANNON, *P. B. C. C.*
J. H. BUNCE, *P. B. A.*
J. M. VAUGHAN, *C. B. C. C.*
OLIVER LUCAS, *C. B. A.*

133 Approved Jan. 1st, 1869.

PHILIP TOMPERT, *Mayor.*

A true copy from the original record.
Attest: JNO. G. BAXTER, *Mayor.*

OFFICE LOUISVILLE GAS CO., *Dec'r 28th*, 1868.

To the COMMITTEE OF THE CITY COUNCIL:

In my conference with you, in relation to certain amendments in the new charter of the Gas Company, it is needless for me to express my desire, and that of the directors, to come to a clear and just understanding, and agree to such amendments in said charter as may be considered reasonable. This matter has been freely canvas-ed in my own mind and that of the directors of the Gas Company, both at the present time and when the charter was first obtained, and as I had much to do with drafting the charter, it is needless to say that my knowledge of the affairs of the Gas Company, as well as my substantial interest in the city of Louisville, lead me to guard well the interest of the city in furnishing light with due consideration of the just claims of the private corporation, especially, too, when the city herself is so large an owner in the gas-works.

134

In connection with — protecting the interest of city and citizens I will bring the committee's attention to the fact that the new charter calls for a gas inspector to be appointed by the city council (see sec. 8th), and in section 12th requires the president and directors to keep a record of their proceeding, to be produced at any time in business hours, to a committee of the general council. There have been, however, from time to time, various suggestions about amendments on the part of members of the city council.

135

These have all been brought to the attention of the directors and fully canvassed, with a desire on their part to do what is conceived to be their duty, and they have allowed me to consent to amendments embracing the following points, first, to change sec. 7th to read: And said public lamps shall be furnished to the city at actual cost, said cost not to exceed $35 per lamp, and that the charge of gas to private consumers shall be so graded as that the company's profits shall not exceed 12 per cent., ten per cent. of which can be drawn annually by the stockholders, the other two per cent. to be laid out for extensions and not to be capitalized, except at the end of every five years.

2nd. Section 5th shall read: As that extensions are bound
136 to be made as a guarantee of 7 per cent.

3rd. That the stock, trust fund, and other interest the city has, or may have, in the gas-works shall not be disposed of, but retained for the purpose of paving for the public lights of the city, and all future investments of unemployed profits belonging to the city to be made by the directors of the Gas Company as trustees, with the concurrence and advice of the city council.

4th. To engraft the amendment passed to the enabling act passed for the purchase of the gas-works by the city, viz: That this company have the exclusive privilege of erecting and establishing gas-works in the city during the charter, and of vending gas lights and supplying the city and citizens with gas by means of public
137 works.

5th. No alteration or amendment to this charter to be made without the concurrence of the city council and the directors of the Gas Company.

6th. An amendment of but small importance.

Sec. 2nd. Providing that on the reissue of stock the fraction division may be received in cash or in one share of stock when the difference in value is paid to the company by the stockholder.

All of which is respectfully submitted.

J. LAWRENCE SMITH, *Pres't.*

A true copy from the original.

Att. JOHN G. BAXTER, *Mayor.*

At a session of the board of councilmen of the city of Louisville, held at their chamber in the city hall, on Thursday evening,
138 Aug 30th, 1877, there were present the following members: Mr. Henry T. Jefferson, president, and member from 5th ward.

From the	1st	ward,	Messrs.	Jacob Brickel and ———.
"	2nd	"	"	J. J. T. Murray and ———.
"	3rd	"	"	R. D. Hall and H. W. Kohnhorst.
"	4th	"	"	Jno. McAllcer and Wm. C. Smith.
"	5th	"	"	G. H. Delehen and ———.
"	6th	"	"	J. A. Isert and ———.
"	7th	"	"	Rozel Weissinger, S. Vollman.
"	8th	"	"	——— and ———.
"	9th	"	"	Dennis Long and Ed. Fuller.
"	10th	"	"	Mike Scott & J. P. McCollum.
"	11th	"	"	J. C. Robinson & Jno. Gault.
"	12th	"	"	W. H. Newhall & Jno. A. Specht.

Mr. Smith, from special committee, reported an ordinance granting the right to the Citizens' Gas Light Company of Louisville to establish a gas-works, and lay down its pipes and mains in and along the streets, alleys, and public ways of said city, so far as the general council has the legal right to grant the same; which was
139 read once, the charter provision and rule of the board suspended by a vote of two-thirds of all the members elect—

When Mr. Weissinger moved to postpone until next meeting at 9 o'clock; which was lost by the following vote:

Yeas—Messrs. Bickel, McCollum, Robinson, and Weissinger—4.

Nays—President Jefferson, and Messrs. Detchen, Fuller, Gault, Hall, Isert, Kohnhorst, Long, McAteer, Murray, Newhall, Scott, Smith, Specht, and Vollman—15.

Mr. Detchen moved to amend: "That within two years from the passage of ordinance that said company shall have laid ten miles of pipes, and lay ten miles each year, and by the first day of January, 1889, said company to have pipes laid wherever the Louisville Gas Company have pipes.

140 On motion of Mr. Bickel the amendment was laid on the table.

Mr. McAteer moved to reconsider the vote refusing to postpone, which was lost.

On motion, the ordinance was taken up by sections.

Section 1 was read, when Mr. McAteer moved to amend sub-section 2; to insert "the quality of gas to be equal to sixteen spermicetta candles' illuminating powers," which was adopted.

Mr. Weissenger moved to strike out sub-section 5, "that a majority of the stock in said company shall be held, owned, and controlled by the citizens of Louisville," which was adopted.

When the section as amended was adopted.

Section 2 was read and adopted.

When the ordinance as amended was passed by the following vote:

141 Yeas: President Jefferson and Messrs. Bickel, Detchen, Fuller, Gault, Hall, Isert, Kohnhorst, Long, McAteer, McCollum, Murray, Newhall, Scott, Smith, and Vollman—16.

Nay: Mr. Weissenger—1.

A copy.

Attest: L. R. McCLEERY, *C. B. C.*

At a session of the board of councilmen of the city of Louisville, held at their chamber in the city hall on Thursday evening, Sept. 6th, 1877, there were present the following members:

Mr. Henry T. Jefferson, president, and member from 5th ward.

From the	1st	ward, Messrs.	Jno. M. Letterle & Jacob Bickel.
"	2nd	" "	J. W. Stine & J. J. T. Murray.
"	3rd	" "	R. D. Hall & H. Kohnhorst.
"	4th	" "	Jno. McAteer & Wm. C. Smith.
"	5th	" "	G. H. Delchen & ———.
"	6th	" "	R. C. Davis & J. A. Isert.
"	7th	" "	Rozel Weigsenger & ———.
"	8th	" "	——— & ———.
"	9th	" "	Ed. Fuller & Dennis Long.
"	10th	" "	J. P. McCollum & Mike Scott.
"	11th	" "	J. C. Robinson & Jno. Gault.
"	12th	" "	W. H. Newhall & Jno. A. Specht.

142 President Jefferson presented an ordinance of this board granting the right to the Citizens' Gas Light Company of Louisville to establish a gas-works and lay down its pipes and mains in and along the streets, alleys, and public ways of said city, so far as the general council has the legal right to grant the same, with an amendment from the board of aldermen, "and that within the two years there shall be an investment made by said company in works and mains equal in value to the sum of $75,000," which was adopted, when the ordinance as amended was passed.

A copy.
Attest: L. R. McSTEERY, *C. B. C.*

At a session of the board of councilmen of the city of Louisville, held at their chamber, in the city hall, on Thursday evening, Sept. 30th, 1877, there were present the following members:

143 Mr. Henry T. Jefferson, president, and member 5 ward.
From the 1st ward, Messrs. Jno. M. Letterel & Jacob Bichel.
From the 2d ward, Messrs. Jno. W. Stine & J. J. T. Murray.
" 3d " " R. O. Hall & H. W. Kohnhorst.
" 4th " " Wm. C. Smith & ———.
" 5th " " G. H. Detchen & ———.
" 6th " " R. C. Davis & ———.
" 7th " " S. Welman & Rozel Weissenger.
" 8th " " Buford Troyman & Jno. Callaghan.
" 9th " " Ed. Fuller & ———.
" 10th " " Mike Scott & ———.
" 11th " " J. C. Robinson & ———.
" 12th " " W. H. Newhall & ———.

A message was received from his honor the mayor vetoing an ordinance granting the right to the Citizens' Gas Light Company of Louisville to establish a gas-works and lay down its pipes and mains in and along the streets, alleys, and public ways of said city, so far as the general council has the legal right to grant the same.

144 On motion, the vote passing the ordinance was reconsidered and made the special order of business next meeting at 9 o'clock.

A copy.
Att.: L. R. McCLEERY, *C. B. C.*

At a session of the board of councilmen of the city of Louisville, held at their chamber in the city hall, on Thursday evening, Oct. 4, 1877, there were present the following members:

Mr. Henry T. Jefferson, president, and member from the 5th ward.
From the 1st ward, Messrs. John M. Letterle & Jacob Bickel.
" " 2nd " " J. J. T. Murray & ———.
" " 3rd " " R. D. Hall & H. W. Kohnhorst.
" " 4th " " John McAteer & Wm. C. Smith.
" " 5th " " J. H. Detchen & ———.
" " 6th " " R. C. Davis & J. A. Isert.

From the 7th ward, Messrs. Rozel Weissenger & S. Ullman.
" " 8th " " Buford Troyman & ———.
" " 9th " " Ed. Fuller & ———.
" " 10th " " Mike Scott & J. P. McCollum.
" " 11th " " J. C. Robinson & ———.
" " 12th " " Jno. A. Specht & W. H. Newhall.

Special order, 9 o'clock.

145 Being the consideration of an ordinance granting the right to the Citizens' Gas Light Company of Louisville to establish a gas-works and lay down its pipes and mains in and along the streets, alleys, and public ways of said city, so far as the general council has the legal right to grant the same.

Mr. Smith moved that action on the ordinance be postponed until next meeting at 9 o'clock, and that a committee of three be appointed to wait upon the president and directors of the Gas Company, and ask them to reduce the price of gas to $2.25 per thousand feet, and report next meeting, which was adopted by the following vote:

Yeas: President Jefferson and Messrs. Detchen, Fuller, Isert, McAteer, McCollum, Newhall, Robinson, Smith, Troyman, and Volman—11.

146 Nays: Messrs. Bickel, Davis, Hall, Kohnhorst, Letterle, Murray, Scott, and Weissinger—8.

When Messrs. Smith, Detchen, and Fuller were appointed said committee.

A copy.
Attest: L. R. McCLEE-Y, *C. B. C.*

At a session of the board of councilmen of the city of Louisville, held at their chamber, in the city hall, on Thursday evening, Oct. 11, 1877, there were present the following members:

Mr. Henry T. Jefferson, president, and member from 5th ward.
From the 1st ward, Messrs. Jacob Bickel & ———.
" 2nd " " J. J. T. Murray & ———.
" 3rd " " R. D. Hall & H. W. Kohnhorst.
" 4th " " Jno. McAteer & Wm. C. Smith.
" 5th " " D. H. Detchen & ———.
" 6th " " R. C. Davis & J. A. Isert.
" 7th " " Rozel Weissenger, S. Vollman.
" 8th " " Buford Twyman & ———.
" 9th " " C. D. Fuller & ———.
" 10th " " Mike Scott & ———.
" 11th " " J. C. Robinson & Jno. Gault.
147 " 12th " " W. H. Newhall & Jno. A. Specht.

Special order, 9 o'clock.

Being the consideration of an ordinance granting the right to the Citizens' Gas Light Company of Louisville to establish a gas-works and lay down its pipes and mains in and along the streets, alleys,

and public ways of said city, so far as the general council has the legal right to grant the same.

When Mr. Smith submitted the report of the committee of three, appointed to wait upon the president and directors of the Gas Company, and ask them to reduce the price of gas to $2.25 per 1,000 feet, which was read, stating that the company refused to make the reduction, which was ordered to be filed.

When Mr. Smith moved that action on the ordinance be
148 postponed until next meeting at 9 o'clock, which was adopted by the following vote:

Yeas: President Jefferson and Messrs. Bickel, Davis, Detchen, Fuller, Gault, Hall, Isert, Kohnhorst, Aleer, Murray, Newhall, Robinson, Smith, and Specht—15.

Nays: Messrs. Scott, Twyman, Vollman, and Weissenger—4.

A copy.
Att.: L. R. McCLEERY, *C. B. C.*

At a session of the Board of Councilmen, of the city of Louisville, held at their chambers in the city hall on Thursday evening, Oct. 25, 1877, there were present the following members:

Mr. Henry T. Jefferson, president, and member 5th ward.
From the 1st ward, Messrs. Jno. M. Letterle & Jacob Bickel.

	"	2nd	"	" J. W. Stine & J. J. T. Murray.
	"	3rd	"	" R. D. Hall & H. W. Kohnhorst.
	"	4th	"	" W. C. Smith & ———.
	"	5th	"	" G. H. Detchen & ———.
	"	6th	"	" R. C. Davis & J. Isert.
149	"	7th	"	" Rozet Weissenger & S. Vollman.
	"	8th	"	" Buford Twyman & Jno. Callaghan.
	"	9th	"	" Ed. Fuller & Dennis Long.
	"	10th	"	" Mike Scott & J. P. McCollum.
	"	11th	"	" J. C. Robinson & Jno. Gault.
	"	12th	"	" W. H. Newhall & Jno. A. Specht.

Special order, 9 o'clock, being the consideration of an ordinance granting the right to the Citizens' Gaslight Company, of Louisville, to establish a gas-works and lay down its pipes and mains in and along the streets, alleys, and public ways of said city, so far as the general council has the legal right to grant the same.

When the question being taken on the passage of the ordinance, the objections of the Mayor to the contrary notwithstanding, the same was passed by the following vote:

Yeas: President Jefferson, and Messrs. Bikel, Davis, Calli-
150 ghan, Detchen, Fuller, Gault, Hall, Isert, Kohnhorst, Long, Letterle, Murray, Newhall, Scott, Smith, Specht, Stine—18.

Nays: Messrs. McCollum, Robinson, Twyman, Volman, and Weissenger—5.

A copy.
Att.: L. R. McCLEERY, *C. B. C.*

At a meeting of the board of aldermen of the city of Louisville, held at their chamber in the city hall on Thursday evening, September 6, 1877, the following members were present:

Mr. Wm. F. Rubel, president, and member 2nd ward.
From the 1st ward, Wm. F. Miller.
" 2nd " ———.
" 3d " Casper Mercke.
" 4th " Wm. Zabel.
" 5th " T. E. C. Brinly.
" 6th " Harry Stucky.
" 7th " H. C. Murrell.
" 8th " H. S. Moss.
" 9th " J. C. Gilbert.
" 10th " Geo. W. Griffiths.
" 11th " Frank Roberts.
151 " 12th " Jno. P. Byrne.

Mr. Stucky submitted an ordinance from the board of councilmen of Louisville to establish the gas-works and lay down its pipes in and along the streets, alleys, and public ways of said city so far as the general council has the legal right to grant the same. The ordinance was read once and ordered to be read a second time, when the second reading was dispensed with by the following vote:

Yeas: Messrs. Miller, Mercke, Zabel, Brinly, Stucky, Murrell, Griffiths, and Roberts—8

Nays: President Rubel and Messrs. Moss, Gilbert, and Byrne—4.

Mr. Gilbert submitted an amendment requiring the company to expend $75,000 within the first two years of its existence
152 under the ordinance for works and mains, which was adopted by the following vote:

Yeas: President Rubel and Messrs. Zabel, Stucky, Murrell, Moss, Gilbert, and Byrne—7.

Nays: Miller, Mercke, Brinly, Griffiths, and Roberts—5.

Mr. Byrne, from the committee on gas and water, submitted a report adverse to granting the rights asked for by the Citizens' Gas Light Company, which was received and filed.

The ordinance was then passed by the following vote:

Yeas: President Rubel and Messrs. Miller, Mercke, Zabel, Brinly, Stucky, Murrell, Gilbert, Griffiths, and Roberts—10.

Nays: Messrs. Moss & Byrne—2.

A copy.
Attest: OLIVER LUCAS, *C. B. A.*

At a meeting of the Board of Aldermen of the city of Louisville, held at their chamber in the city hall, on Thursday evening,
153 December 13, 1877, the following members were present:

Mr. Wm. F. Rubel, president and member 2d ward.
From the 1st ward, Wm. F. Miller.
" 2d " ———.
" 3d " Casper Mercke.
" 4th " Wm. Zabel, Jr.

From the 5th ward, T. E. C. Brinly.
" 6th " Harry Stucky.
" 7th " H. C. Murrell.
" 8th " H. S. Moss.
" 9th " J. C. Gilbert.
" 10th " Geo. W. Griffiths.
" 11th " Frank Roberts.
" 12th " Jno. P. Byrne.

A message was received from his honor, the mayor, transmitting, with his objections, an ordinance granting the right to the Citizens' Gas Light Company, of the city of Louisville to establish a gas-works and lay down its pipes and mains in and along the streets, alleys, and public ways of said city, so far as the general council
154 has the legal right to grant the same, the question being upon the passage of the ordinance, the objections of the mayor to the contrary notwithstanding, the same was passed by the following vote:

Yeas: Messrs. Miller, Mercke, Zabel, Brinly, Stucky, Murrell, Gilbert, Griffiths, and Roberts—9.

Nays: President Rubel, and Messrs. Moss, and Byrne—3.

A copy.
Att.: OLIVER LUCAS, *C. B. A.*

An ordinance granting the right to the Citizens' Gas Light Company of Louisville, to establish a gas-works, and lay down its pipes and mains in and along the streets, alleys, and public ways of said city, so far as the general council has the legal right to grant the same.

SEC. 1. Be it ordained by the general council of the city of
155 Louisville that the Citizens' Gas Light Company, organized under a charter of the General Assembly of the Commonwealth of Kentucky, approved 21st of March, 1872, entitled "An act to incorporate the Citizens' Gas Light Company of Louisville," as organized with Geo. Ainslie, president; Sam'l L. Avery, Thomas Coleman, James Todd, Samuel Russell, John G. Barrett, and H. Victor Newcomb, as directors, be, and is hereby, granted the right, so far as the city of Louisville has the legal right so to do, to establish a gas-works, and lay down its pipes and mains in and along the streets, alleys, and public ways of the city, and make such other connections and arrangements as may be needful and necessary for the supply of gas to the citizens or city for a period of twelve years from the date of the passage of this ordinance, upon the following express conditions, to wit:

156 1st. That any and all pipes, mains, and connections in and along the streets, alleys, or public ways shall be laid subject to ordinance or resolution of the general council under the supervision of the city engineer.

2nd. That said company shall not charge a greater price for gas to consumers as the present cost of production than two dollars per thousand cubic feet, and any advance over two dollars per 1,000

cubic feet shall be only in proportion to increased cost of production, and in the event the net profits of the said company, at the rate of two dollars per 1,000 cubic feet, exceed ten per cent. per annum upon the paid up capital stock of the company, the price shall be accordingly reduced. The quality of gas to be equal to
157 sixteen sperm*isetta* candles illuminating power.

That if at any time the city of Louisville may elect the Citizens' Gas Light Company shall supply the public lights of the city with gas, and it shall not charge the city more than the actual cost of production, which shall be determined in the following manner: By dividing the number of feet of gas made into the sum of the following items, after deducting the gross amount of residuals or other material sold, to wit:

Coal carbonized (including all charges for storage and hauling and loss on same).

Lime or other agent used in purifying (including all charges for storage and hauling and loss on same).

158 Wages (salary of superintendent and two clerks at works, and the men engaged at the works in the production of gas).

Repairs to the works (not including extensions or betterments), including materials actually used, and labor actually performed.

All taxes on works.

Deduct coke, tar brese, or other material actually sold.

And the said company shall make semi-annual statements of the actual cost of manufacturing gas to the mayor and general council, and the books from which said statements are compiled shall be subject to investigation of the mayor or other committee of the general council.

4th. That in the event of the said company furnishing gas for the public lights, the amount of gas so consumed shall be ascer-
159 tained by placing a meter to each one hundred gas lamps to be equally distributed throughout the city, and located with proper reference to the highest and lowest levels of the mains, which shall be lighted and extinguished at the hour of lighting and extinguishing the public lights, and the average amount of gas so consumed shall be the maximum to be charged for all public lights of the city.

5th. That said company shall not require a deposit from gas consumers.

6th. That said company shall extend and lay its pipes whenever the gas subscribed for and to be sold shall pay sufficient profit to equal six per cent. on the cost of such extension.

7th. That said company shall consent to the appointment
160 by the general council of a competent inspector of all meters to be used by said company that may register incorrectly so that consumers shall only be required to pay for gas actually consumed by them or passing through their meters.

8th. That said company shall be subject to all regulations or requirements of the city now required of the Louisville Gas Company, & any just or reasonable legislation that may be enacted by

the general council hereafter for the reasonable protection of the city and citizens.

9th. That said company shall proceed as rapidly as practicable to establish it works and lay down its pipes and mains after the passage of this ordinance, provided the said company shall have erected its gas-works, laid its mains, and be prepared to sup-
161 ply the citizens with gas within two years after the approval of this ordinance: and this ordinance and all rights and privileges granted thereunder shall be null and void should said company fail to keep and perform each and every provision of this ordinance in each and every particular.

10th. That for the faithful performance of all the provisions of this ordinance the Citizens' Gas Light Company shall execute a bond, with good security, to the amount of $75,000, to be approved by the mayor and general council, and that within the two years there shall be an investment made by said company in works and mains equal in value to the sum of $75,000.

SEC. 2. That nothing herein granted or authorized shall be
162 construed as making the city liable for any damage by reason of any right or privilege heretofore granted to or now existing with the Louisville Gas Company.

HENRY T. JEFFERSON, *P. B. C.*
WM. F. RUBEL, *P. B. A.*
L. R. McCLEERY, *C. B. C.*
OLIVER LUCAS, *C. B. A.*

Passed, the objections of the mayor to the contrary notwithstanding, Dec. 13th, 1877.

A copy.
Att.: L. R. McCLERY, *C. B. C.*

Order. Pl'ff file Reply.

And at a court held for the court aforesaid on the 23rd day of Jan'y, 1880—

Came plaintiff by counsel and filed a reply to the answer of the defendant herein, which reply is in words and figures as follows, to wit:

Pl'ff's Reply.

The plaintiff, "The Citizens' Gas Light Company of Louisville," for reply herein, denies that there has been since Feb'y 15th,
163 1838, and up to the time of this suit, a corporation in Louisville, Kentucky, continuously existing, called the Louisville Gas Company, or that no other corporation since Feb'y 15th, 1838, has borne that name during said period. It denies that the plaintiff is a corporation without capital or credit, or that it has never made a movement towards laying an inch of pipes, or manufacturing a foot of gas. It denies that by virtue of any acts of the Legislature of Virginia, at any time, there was vested in the city of Louisville the lands described in the answer, or any lands, or that by virtue of said

grant said city owns, or at any time owned, in fee, various streets, alleys, lanes, and highways held by it in said territory, described in the answer. On the contrary, they state that by the
164 said acts of the Virginia Legislature, the said property was vested in certain persons as trustees of the city of Louisville, to be by them laid off into lots, with convenient streets, and that the said streets, when so laid out, became like other streets of other cities in the Commonwealth of Kentucky, subject to the use of the public as such and subject to such legislative authority as other streets are subject to, and so with the alleys, highways, and lanes in said city.

It denies that the said act of January 30th, 1867, or that the said act of January 22d, 1869, or either of them, were valid to create or extend any corporation, or the old gas company of 1838. It denies that at the time that the said acts of 1867 and 1869 took
165 effect, that the Louisville Gas Company had already rendered public services more than commensurate with the privileges granted by said act or any public services. It denies that said corporation, The Louisville Gas Company, became bound to perform any public service to the city of Louisville or to its citizens, or that the services which it undertook to perform and which are *in*numerated in said answer were public services. It denies that the said Louisville Gas Company has continued up to this time, or that it will continue to the end of the term, to faithfully perform the duties and obligations imposed by said act. It has no knowledge or information sufficient to form a belief as to whether the said
166 Louisville Gas Company has invested one million or one million five hundred thousand dollars in said works. It denies that the said works are of the said values, or either of them.

It denies that the defendant has reduced the price of gas to private consumers, from time to time, so as to keep within its limit of profit, or has made less profit than the charter allowed. It denies that except by the granting and continuation of an exclusive privilege the defendant would be able to perform its function of selling gas, or to perform the acts which it has performed in the selling of gas.

It denies that the agreement with the city of Louisville, which is alleged to have been made by the Louisville Gas Company, or that any agreement of the Louisville Gas Company with the State of Kentucky, which is alleged to have been made, secured to the
167 Louisville Gas Company, for the full term of twenty years, from January 1st, 1869, the exclusive privilege of erecting and establishing gas-works in the city of Louisville, or of vending coal-gas, or supplying said city and citizens with gas by means of public works, or that said exclusive privilege is inviolable, or can be thus in any way imparted by the State of Kentucky or the city of Louisville, or both combined. It denies that the act incorporating the plaintiff, or the ordinance in respect thereto, are null or void in so far as either of them assumed to grant to the plaintiff any privilege or franchise to erect a gas-works in the city of Louisville, or to vend coal-gas therein, or to supply said city or citizens with gas, or to lay mains or pipes in the streets, alleys, high-

ways, or lanes of said city, or any other privilege or fran-
168 chise in opposition to said exclusive right asserted by the Louisville Gas Company, or that any portion of the said rights of the plaintiff are null and void. It denies that to allow the plaintiff to interfere with the exclusive privilege claimed by the Louisville Gas Company would be detrimental to the city of Louisville or its citizens, or that it is a fact, or that it was known or considered as a fact by any one except perhaps the officers and stockholders of the Louisville Gas Company, that the manufacture or distribution of gas must of necessity be a monopoly or that it was not subject to competition. It denies that to have two separate agencies to accomplish the task of furnishing gas to the city of Louisville would increase the expense without increasing the
169 value or profit to the citizens. It denies that it was greatly to be preferred by the city or its citizens, or at all to be preferred that there should be one company only, or that the rights of the city and citizens were properly guarded and protected in the said pretended charter of the Louisville Gas Company, or that the plaintiff would be enabled to exact whatever they could get from the citizens for gas, or that there would be any harm follow to the city or citizens from the operating and conducting of a gas-works by the plaintiff. It denies that no subscriptions have ever been invited by the plaintiff for its stock, or that no stock has been subscribed, or that nothing further was done for completing the legal existence of the plaintiff, and its organization as a corporation. It denies
170 that the organization of the plaintiff was abandoned, or that its board of directors have ever ceased to exercised their officers, or that the same has become or were vacated, or that in 1877, or any other time, any portion of its corporators illegally, or without warrant of law, assumed to make a new organization of said corporation or elected their directors, or that any other action of the plaintiff in organizing or in electing directors was void, or that in the year 1878 the said organization was abandoned and a third organization attempted to be made by the election of directors, or that the plaintiff is without any legal organization of any kind, or that the person assuming to act as president thereof is not such, or that those assuming to be its directors are not such, or that the
171 plaintiff's corporation has no existence whatever, or that it was on Dec. 19, 1877, incapable of receiving any grant, or that it is now incapable of maintaining this action, or that it has ceased to exist, or that it had so ceased to exist before Dec. 13, 1877. It denies that the only authority that the plaintiff has to lay its pipes is made dependent upon its first obtaining the consent of the general council of Louisville. It denies that the general council has no right to give such consent until the expiration of the charter of the Louisville Gas Company. It denies that the consent of the city of Louisville, in the ordinance of December 13th, 1877, is no way sufficient, or that it cannot form a basis of a claim on the part of the plaintiff. It denies that the plaintiff has not proceeded as rapidly as prac-
172 ticable to establish its works and lay down its pipes and mains. It denies that the plaintiff has utterly failed to take

any step in that direction, or that the plaintiff has not in any way attempted to establish its works and lay down its pipes or mains, or that it would be impossible for it now to erect its works, or that it does not intend to do so, or that it does not intend to make any such endeavor, or that it does not intend to begin said work, or that it has not invested anything in said efforts, or that it has failed to keep any provision of said ordinance, or that it has hereby become null, void, or — no effect. It states that if it has in any respect failed to keep said ordinance, or the provisions thereof, the said failure was occasioned by the wrongful acts of the defendant set
173 forth in the petition herein, and it states that the city of Louisville has never in any mode forfeited the claim or right of the plaintiff or attempted to do so, and that the said city of Louisville, by a resolution duly passed by the general council of said city, and which has become a law of the said city, waived any and all right to forfeit the rights of the plaintiff under said ordinance, if any such right of forfeiture existed. (A copy of said resolution is herewith filed as part hereof, marked "A. X.") The plaintiff denies that it has no existence, or that it has no means or authority to pursue the ends of its existence.

Wherefore the plaintiff prays as in its original petition, and for all general and equitable relief.

BIJUR & DAVIE,
BARRETT & BROWN,
174 BEATTIE & WINCHESTER,
For Plaintiff.

Order Not'ing Def't Filing Amended & Sup'l Answer.

And at a court held for the court aforesaid on the 20th day of February, 1880, came defendant, by counsel, and filed an amended and supplemental answer herein, which amended and supplemental answer is in words and figures as follows, to wit:

Amended & Supplemental Answer.

Defendant, by way of amended and supplemental answer, states that the ordinance referred to in the original answer, as marked XX, so far as it was capable of becoming a valid and binding ordinance, became such of Dec. 13, 1877; that more than two years have expired since that date; that the plaintiff has not yet erected nor begun to erect a gas-works, nor laid nor begun to lay any
175 mains, nor is it prepared to supply any gas, nor has it executed the bond required by said ordinance, nor has it invested anything in works or mains.

Defendants state and pray as before.

BARR, GOODLOE & HUMPHREY,
I. & J. CARDWELL & WINSTON,
T. L. BURNETT, *p. q.*

Order File Exhibit by Pl'ff.

And at a court held for the court aforesaid on the 9th day of April, 1880, came plaintiff, by counsel, and filed an exhibit herein, which exhibit is in words and figures as follows, to wit:

EXHIBIT.

At a meeting of the board of aldermen of the city of Louisville, held at their chamber in the city hall, on Wednesday evening, November 26, 1879, the following members were present:

176 Jas. C. Gilbert, president, and member 9th ward.
From the 1st ward, H. W. Barr.
From the 2nd ward, Wm. S. Long.
" 3rd " N. W. Hughes.
" 4th " W. H. Bailey.
" 5th " T. E. C. Brinly.
" 6th " Harry Stucky.
" 7th " H. C. Murrell.
" 8th " Chas. Godshaw.
" 9th " ———.
" 10th " Frank Roberts.
" 11th " ———.
" 12th " Jno. P. Byrne.

Mr. Stucky introduced a resolution (upon a petition) granting the Citizens' Gas Light Company of Louisville, Ky., further time for two years to lay their mains and pipes in the public ways of the city, which was adopted.

A copy.
Attest: OLIVER LUCAS, *C. B. A.*

177 At a session of the board of councilmen of the city of Louisville, held at their chamber in the city hall on Wednesday evening, November 26th, 1879, there were present the following members:

Mr. R. C. Davis, president, and member from the 6th ward.
From the 1st ward, Messrs. Jacob Bickel & Vincent Brada.
" 2nd " " Chas. Mehler & Dr. J. L. Mason.
" 3rd " " H. W. Kohnhorst & Jno. Fischer.
" 4th " " Fred. Perkins & ———.
" 5th " " T. M. Sullivan & W. Lewis Clark.
" 6th " " J. A. Isert & ———.
" 7th " " S. Volman & Edward Wilder.
" 8th " " Laf. Joseph & S. R. Kean.
" 9th " " B. McAlee & Dennis Long.
" 10th " " Mike Scott & Thos. Feely.
" 11th " " C. W. Erdman & Dr. J. M. Spaulding.
" 12th " " Ed. McColloch & A. Wahking.

Mr. Kohnhorst presented a petition from W. N. Haldeman, president of the Citizens' Gas Light Company, asking for further time to

comply with the provisions of ordinance No. 686, passed De-
178 cember 13, 1877, with a resolution extending all the rights, privileges, and conditions specified in said ordinance, for the further time of two years from December 13, 1879, which was adopted.

A copy.
Att.: L. R. McCLEERY, *C. B. C.*

The following petition was presented to the board of councilmen and board of aldermen on November 26, 1879:

To the honorable the general council of the city of Louisville:

Your petitioner, The Citizens' Gas Light Company of Louisville, Kentucky, states that by an ordinance passed on the 13th day of December, 1879, being ordinance No. 686, it was ordained by the general council of the city of Louisville that the petitioner, The Citizens' Gas Light Company of Louisville, be granted the
179 right, so far as the city of Louisville has the legal right to do so, to establish a gas-works, and lay down its pipes and mains in and along the streets, alleys, and public highways of the city, and make such other connections and arrangements as may be needful and necessary for the supply of gas to the citizens or city for a period of twelve years from the passage of said ordinance.

And your petitioner states that in the said ordinance were certain provisions, requirements, and conditions which the petitioner was to perform, if practicable, within two years from the date of the approval of said ordinance.

And your petitioner states that it has not been practicable nor possible for it to perform the said requirements and conditions up to this time, because to do so would require the sale of its
180 stock and the laying of pipes in the streets of Louisville, none of which things could be done up to this time, because of a false claim of the Louisville Gas Company: that the said Louisville Gas Co. has the exclusive privilege and monopoly to make and sell gas in this city, and to lay pipes in its streets, by reason of which false claim and denial by the rights of this petitioner, this petitioner has been rendered unable to sell its stock or to lay pipes, or to do other things required by said ordinance.

Your petitioner states that on October 11th, 1879, it filed its suit in the Louisville chancery court against said Louisville Gas Company to test its said rights, and to contest the rights of the said Louisville Gas Company to monopolize the making and sell-
181 ing of gas in this city, which said suit is now pending, and is being pushed forward to trial.

Your petitioner states that in the said suit said Louisville Gas Company to maintain its said monopoly, and to prevent the petitioner from contesting the same, by pretending and asserting that the rights of the petitioner and its privilege to make and sell gas, and to lay its pipes in the streets of this city, will expire and terminate on the 13th day of December next, before the said suit can be tried.

Your petitioner respectfully shows that it will be greatly to the in-

terest of the citizens of Louisville and to the advantage of the city to have the said claim of monopoly on the part of the Louisville Gas Company tested, and it will be very unjust to the peti-
182 tioner to permit any use to be made of said provisions and conditions of said ordinance to the injury of the petitioner, and to permit said provisions and conditions to be used to prevent a fair trial and test of the rights of said two companies and the question of said monopoly.

Your petitioner further states, and hereby respectfully notifies your honorable body, that it is ready to enter into and carry out all the provisions of said ordinance when its rights in the premises are determined by the court before which *them* are now pending.

Now, therefore, the premises considered, your petitioner respectfully ask that your honorable body will accept this as an offi-
183 cial notification on its part of its willingness and readiness to comply with all the conditions of said ordinance as therein specified, conditioned that as soon as the court determine the question at issue this company is ready and prepared to execute all the papers and do all the acts required by the provisions of said ordinance.

Very respectfully, W. N. HALDEMAN.

When the following resolution was presented at the same time and passed November 26th, 1879, and was returned to the office of the clerk of the board of councilmen, about December 6th, 1879, without the signature of the mayor (that is without his approval).

Be it resolved by the general council of the city of Louis-
184 ville, That the communication of the Citizens' Gas Light Company submitted, of this date, be, and the same is hereby, accepted and received as therein conditiond as the notification of said company of its readiness and willingness to carry out the provisions of ordinance No. 686, passed on the 13th day of December, 1877, and that said Citizens' Gas Light Company is hereby entitled to all the rights, privileges, and conditions specified in said ordinance for the further time, two years from and after the 13th day of December, 1879.

L. R. McCLEERY, *C. B. C.*
OLIVER LUCAS, *P. B. C.*
R. C. DAVIS, *C. B. A.*
JAS. C. GILBERT, *P. B. A.*

A copy.
Attest: L. R. McCLEERY, *C. B. C.*

A copy.
Attest: JNO. G. BAXTER, *Mayor.*

At a court held for the court aforesaid on the 3rd day of Dec., 1880—

185 This action having been set at rules on the 29th instant by plaintiff, it is now ordered that the same be, and is, postponed until the 4th inst. for hearing.

Order Postponing Trial.

At a court held for the court aforesaid on the 4th day of December, 1880—

Ordered that this action be, and is, postponed until the 4th day of January, 1881, for hearing.

And at a court held for the court aforesaid on the 27th day of May, 1881—

This action having been set at rules on the 23rd inst. by plaintiff:

It is now ordered that the same be, and is, postponed until June 14th, 1881, for hearing.

186 And at a court held for the court aforesaid on the 11th day of June, 1881—

Leave is given Goodloe, Roberts, and Humphrey, counsel for the defendant, to take the papers herein from the clerk's office, without leaving copies, to be returned on or before the 15th instant.

And at a court held for the court aforesaid on the 14th day of June, 1881—

Ordered, on motion of defendants, that this action be, and is, postponed until the 25th inst. for hearing.

Order File Amended Answer.

And at a court held for the court aforesaid on the 25th day of June, 1881—

Came defendant by counsel and filed an amended answer herein.

Order to Read Certain Sections of Rules Governing Board of Councilmen.

187 And on motion of defendant, by counsel, it is ordered that sections 9, 22, 23, 25, and 26, for the government of the board of councilmen, each as published in Lucas' Laws and Ordinances of the city of Louisville, be read as evidences in defendant's behalf, subject to all exceptions for competency and relevancy; to which plaintiff objected and excepted.

It is agreed that the filing of the amended answer, this day filed, shall not delay the trial of this action.

Which amended answer, filed on the 25th day of June, 1881, is in words and figures as follows, to wit:

Amended Answer.

188 The defendants for amended answer say that so much of the 1st section of the plaintiff's said alleged charter as empowers the plaintiff to make, sell, and distribute gas for the purpose of lighting buildings, public and private, in the city of Louisville and its adjoining territories, together with the streets, highways, lanes, alleys, parks, and other public places in said city is in violation of the 10th section of Article 1, of the Constitution of the United States, because the defendant says it contracted with the State of Kentucky

and with the city of Louisville for a good and valuable consideration for the exclusive right, franchise, and privilege to open the ground in all streets, alleys, highways, lanes, parks, and other places in said city for the purpose of laying and repairing pipes for
189 the purpose of conducting its gas, and of making, selling, and distributing gas for the purpose of lighting the buildings, public and private, in the city of Louisville, together with the streets, highways, lanes, alleys, parks, and other public places therein, and that the defendant contracted for such exclusive rights, franchises, and privileges, as well for that part of said city, called Portland, as for all the rest of said city, and this defendant also contracted with the city of Louisville for such exclusive rights — franchises for twenty years from the first January, 1869. Said contract with the State of Kentucky and this defendant is evidenced by its charter and amendments thereto referred to in its answer, and its contract with the city of Louisville is evidenced by the ordinance
190 and contract referred to in its answer; and the defendant says that so much of the plaintiff's said act of incorporation as affects, or attempts to affect, franchises, rights, privileges, and immunities, as before stated, is in violation of the Constitution of the United States, and impairs the obligation of the contract made by the State of Kentucky with this defendant, and the plaintiff's said act of incoporation to that extent is void.

And the defendant says that the ordinance and resolution of the city of Louisville conceding and granting to the plaintiff the right to open the streets, highways, alleys parks, lanes, and so forth, and to lay pipes in the streets, alleys, highways, parks, and other
191 public places in said city, is null and void, among other reasons, because the said ordinance and resolution impairs the obligation of the contract entered into between the city of Louisville and this defendant, and is in violation of the Constitution of the United States, and is illegal.

Wherefore this defendant prays that said act incorporating the plaintiff, so far as the same attempts to give or confer upon plaintiff power to open the streets, highways, alleys, parks, and other public places in said city of Louisville, at any time within twenty years from 1st of January, 1869, for the purpose of laying pipes, or repairing pipes, to conduct gas, or to make, sell, or distribute gas for the purpose of lighting the buildings, public or private, in
192 the city of Louisville, and its adjoining territories, or to light any street or streets, alley or alleys, highways, lanes, parks, and other public places, be adjudged as repugnant to the Constitution of the United States, illegal, null and void, and that the said ordinance and resolution of the general council of the city of Louisville be adjudged illegal, null and void for the same causes and reasons, and that the plantiff's petition be dismissed and the injunction denied, and for all other and further proper relief.

BURNETT, CALDWELL, AND GOODLOE,
For Defendant.

Order Pl'ffs File Amended Reply.

And at a court held for the court aforesaid on the 28th day of
193 June, 1881, came the plaintiff, by Bijur and Davie, counsel, and filed reply to the amended answers herein.

And it is ordered that this action be and is postponed until the 2nd day of July, 1881, for hearing.

Said reply to amended answers is in words and figures as follows, to wit:

Amended Reply.

The plaintiff, for reply to the amended answers herein, and to the counter-claim set forth in the amended answer herein filed on June 25th, 1881, denies that the ordinance of December 13th, 1877, has been in any manner repealed, or that the rights of plaintiff thereunder have ever been in any manner forfeited or lessened in any mode.

It denies that the plaintiff's charter, or any section thereof, is in violation of the Constitution of the United States. It denies
194 that defendant contracted with the State of Kentucky, or with the city of Louisville, for a good or valuable consideration, or otherwise, for the exclusive right, franchise, or privilege to open the ground and streets in the city of Louisville or Portland for laying and repairing pipes for its gas business, or for twenty years, or any other time, from January 13th 1869.

It denies that the consent of the city of Louisville by said ordinance of December 13th, 1877, or otherwise, was void or of no effect, or was in violation of the Constitution of the United States, or of this State. It denies that the plaintiff has no right, or that defendant has the exclusive right to carry on the gas business in Louisville, or to sell or to vend gas therein, to lay pipes in said city.

195 It denies that there is any right in the defendant to have the plaintiff prohibited from carrying on the gas business in Louisville, or the other localities in the petition set forth.

It prays as in its petition herein.

BEATTIE & WINCHESTER,
BIJUR & DAVIE,
BARRETT & BROWN,
For Plaintiff.

And at a court held for the court aforesaid on the 23rd day of September, 1881, the court, being advised, delivered and filed a written opinion herein.

And on the 29th day of November, 1881, the court rendered the following judgment herein, to wit:

Judgment.

196 This case having been heard and submitted, and the court being advised, it is considered by the court that the petition herein be, and it is hereby, dismissed; and it is further considered

by the court that the defendants recover of the plaintiff their costs herein expended.

To which judgment the plaintiff excepts, and prays an appeal therefrom to the court of appeals, which is granted.

Order File Assignment, Errors, &c.

And on the 12th day of December, 1881, came the plaintiff, by Bijur & Davie, &c., counsel, and filed in the clerk's office of the court aforesaid its assignment of errors and schedule herein, which are in words and figures as follows, to wit:

Assignment of Errors.

The appellant, The Citizens' Gas Light Company, assigns the following errors herein:

197 1. The court erred in dismissing the petition of plaintiff herein and in adjudging costs against plaintiff herein.

2. The court erred in not adjudging to the plaintiff the injunction and the other relief prayed for in the petition.

BEATTIE & WINCHESTER,
BARRETT & BROWN,
BIJUR & DAVIE,
For Appellant.

Notice is hereby accepted hereof.

GOODLOE & ROBERTS
And A. T. HUMPHREY,
Att'ys.

Schedule.

The clerk will copy the entire record.

BIJUR & DAVIE, &c.

Cl'k's Certificate to Record.

COMMONWEALTH OF KENTUCKY, } *set:*
Louisville Chancery Court, }

198 I, Jno. H. Weller, clerk of the Louisville chancery court, do certify that the foregoing 101 pages contain a true and complete transcript of the record in the case of Citizens' Gas Light Company *vs.* Louisville Gas Company, as the same is of record and on file in my said office.

Witness my hand, this 12th day of December, 1881.

JNO. H. WELLER,
Clerk Lou. Ch'y C't.

199 *Order Noting Argument. Case.*

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 4th day of April, 1882—

200 "This cause came on and was argued by John Mason Brown for appellant, T. L. Barrett and J. K. Goodloe for appellee, and laid over."

Order Note Argument. Order Submit.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capitol in the city of Frankfort, on the 5th day of April, 1882—

"This cause came on and was argued by J. K. Goodloe and Isaac Caldwell for appellee, and William Lindsey for appellant, and submitted."

Mandate.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 15th day of June, 1883:

"The court being sufficiently advised, it seems to them that
201 the judgment herein is erroneous. It is considered that said judgment be reversed and cause remanded with directions to issue a perpetual injunction restraining appellee from claiming and exercising the exclusive right to manufacture and supply gas to the city and citizens of Louisville, which is ordered to be certified to said court.

Judg't for Costs.

It is further considered that the appellant recover of the appellee its cost herein expended.

The court at the same time and place delivered the following opinion herein:

Opinion Court Appeals.

In 1838 the Legislature chartered the Louisville Gas Company with the exclusive privilege of manufacturing gas to the
202 city and citizens of Louisville until the 1st day of January, 1869, at which date the charter was to expire.

On the 30th of January, 1867, in anticipation of the expiration of this charter, the Legislature passed an act entitled "An act to extend the charter of the Louisville Gas Company," which provided that it should take effect from the 1st day of January, 1869, and continue twenty years. This last act was in effect, as we have decided in the case of Cain *vs.* Commonwealth, 14 Bush, 535, the creation of a new charter, the powers under which are to be ascertained by reference to this act, and not by reference to the act of 1838. In
203 this last act of 1867 there is no grant of an exclusive privilege to manufacture and sell gas in the city of Louisville.

On the 22nd of January, 1869, after the charter of 1867 had gone into effect, and after its acceptance by the stockholders of the old company, the company applied to and obtained from the Legislature an amendment to the act of 1867, by which the company was

given the exclusive right to manufacture and furnish gas to the city and to the citizens of Louisville during the life of the charter.

On the 21st of March, 1872, the Legislature chartered the Citizens' Gas Light Company with power to manufacture and furnish gas to the city and citizens for the period of fifty years.

The 3d sec. of that act reads:

204 "Said company shall have power and authority, with the consent of the general council of said city, to open the ground in any highway, street, lane, alley, park, or other public place within the limits aforesaid, and lay and repair therein their pipes for conducting gas; said company restoring the same to as good condition as before within a reasonable time thereafter; said company being required in so doing not to injure any gas or water pipes, or connection-, or sewer laid therein, and said corporation being liable to the city of Louisville for any damage it may have to pay for its negligence in so laying, repairing, or restoring, as aforesaid: and such power
205 and authority is subject to such reasonable regulations as the mayor and city council may make for the protection of life, property, and health of citizens."

Appellant constituted this action in equity, alleging the facts stated, and that the claim of appellee to the exclusive right to manufacture and supply gas in the city of Louisville cast a cloud over appellant's title to the franchise, and prevented it from selling its stock to raise the sum of money necessary to the enjoyment of its franchise, and preliminary to its beginning work under its charter. Appellant prays that the cloud on its title may be removed; that it be adjudged that appellee has no such exclusive rights as asserted,
206 and that an injunction be granted restraining appellee from asserting such exclusive claim.

On hearing, the court dismissed appellant's petition with cost, from which judgment this appeal is taken.

The first point made by appellee is that this proceeding in equity for an injunction is not the proper remedy by which to determine whether appellee has the exclusive right to the manufacture and the supplying of gas to and in the city.

If the exclusive right insisted upon by appellee is without warrant of law, is unconstitutional and void, and the assertion of that right prevents appellant from selling its stock and raising the large amount of money necessary to entering upon the enjoyment
207 of its franchise, the whole of the charter rights of appellant *and* destroyed by the assertion of an unfounded claim on the part of appellee. In such case the remedy adopted is peculiarly appropriate, as has been expressly adopted in the similar case of Crescent City Gas Light Co. *vs.* New Orleans Gas Light Co., 27 Lo. Ann., 142. As to whether such claim of exclusive privilege is unfounded because unconstitutional, we will inquire into hereafter. It is enough for jurisdiction that the claim is so alleged.

Secondly. It is insisted that as the conditions of the consent of the city council, manifested by ordinance, exhibited with the petition, are conditions precedent to the exercise of appellant's
208 franchise, and that as they have not been complied with, appellant has no right to entertain its action.

Those conditions are contained in the 9th and 10th sections of the ordinance, and are as follows:

"Ninth. That said company shall proceed as rapidly as practicable to establish its works and lay down its pipes and mains after the passage of this ordinance, provided the said company shall have erected its gas-works, laid down its mains, and be prepared to supply the citizens with gas within two years after the approval of this ordinance, and this ordinance and all rights and privilege- granted thereunder shall be null and void should said company fail
209 to keep or perform each and every provision of this ordinance in each and every particular.

"Tenth. That for the faithful performance of all the provisions of this ordinance the Citizens' Gas Light Company shall execute a bond, with good security, to the amount of $75,000, to be approved by the mayor and general council, and that within two years there shall be an investment made by said company in works and mains equal in value to the sum of $75,000."

Subsequent to this ordinance the city council, by resolution, extended the time for the performance of these conditions two years longer.

210 In the first place, the right of appellant to have the cloud removed from its franchise was precedent to and independent of any consent on the part of the city to the opening of the streets to lay its pipes and mains. On the passage of the charter, and its acceptance by appellant, it became seized of a property right in the franchise, for the protection of which it had the right to invoke the aid of a court of equity. As to whether appellant could or could not obtain the consent of the city council, was a matter with which appellee had nothing to do; so long as the consent might be obtained, it did not lay with appellee to claim that the consent had not
211 been obtained particularly, as the claim of exclusive right on the part of appellee might have been the cause of preventing the consent.

Secondly. The franchise of appellant was valuable without the consent of the city council to the tearing up of streets to lay down pipes and mains, as the business of the corporation might have been carried on without disturbing the streets.

Thirdly. All the conditions contained in the ordinance, except it may be that of giving bond and condition subsequent to the consent of the city council; and as to the matter of the bond, that is an affair between the city and appellants, with which appellee has nothing to do.

Fourthly. The charter of appellant does not require that the
212 consent by the city shall be obtained by ordinance, and although such consent was so obtained, and although it may be conceded that an ordinance cannot be continued in force after its expiration by resolution, yet, as the city council had the right to waive the forfeiture for non-compliance therewith, the resolution is an express and unimpeachable waiver. Even if it be conceded, which is not, that appellant has no right to tear up the streets and lay down its pipes and mains without the consent of the city coun-

cil obtained previous to the assertion of claim in opposition to the exclusive right insisted upon by appellee, it is clear that
213 appellee has no such right to tear up the streets *up the streets* and lay down therein its pipes and mains, even with the consent of the city council, for the seventh section of its charter, granted in 1867, and which gives this right, is expressly repealed by the third section of the act of 1869, amendatory thereof. The language of the third section of the act of 1869, repealing the seventh section of the act of 1867, is plain, emphatic, and unequivocal, and leaves no room for speculation as to the intention of the Legislature in the use of such language.

The repeal of this section of appellee's charter does not effect the rights of appellant, because he must recover on his own title, but it illustrates the fact that the consent of the council
214 under legislative grant to the tearing up of the streets to lay down mains and pipes has not been considered essential to the supply of gas to the city and to the citizens of Louisville, since appellee has continued opporation without such authority since the 22nd of January, 1869.

Appellant objects that the charter of appellee granted by the act of 1867, entitled "An act to extend the charter of the Louisville Gas Company," is unconstitutional and void, because it fails to comply with the requirements of section 37 of act 2 of the State constitution, which provides that "no law of the General Assembly shall relate to more than one subject, and that subject shall be expressed in the title."

215 If this act had been an act entitled "An act to 'incorporate' instead of to 'extend' the Louisville Gas Company," it is probable that no point would have been made in view of the decisions in this State. The general subject embraced in this act is the manufacture and supply of gas to the city and citizens of Louisville, and that subject is as well indicated by the term "extend" as it would be by the word "incorporate," for while the act of 1867 creates a new company, under the old name, the terms of the two charters are substantially the same, and all the terms of each have a natural relation to and connection with the same subject—
216 that is, the manufacture and supply of gas. The act is not unconstitutional on this ground. Louisville & Oldham Turnpike Road Company *v.* Ballard, 2 Met., 168; Phillips *vs.* The Covington Bridge Co., 2 Met., 222; McReynolds *vs.* Smallhouse, 8 Bush, 453.

The next question presented by appellant is whether that portion of the charter of appellee granting the exclusive right to manufacture and supply gas is forbidden by the first section of the 13 article of the State constitution, which is as follows:

"That all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services."

217 We are of the opinion, both on principal and authority,

that such legislation is forbidden by the provision of the constitution quoted.

The authority for this conclusion seems to be ample in this State. Gordon, &c., *v.* Winchester Building Association, 12 Bush, is in point. At the time of the passage of the charter of that association the general law forbade, under a penalty of the forfeiture of the interest, the charging of interest at a greater rate than ten per centum per annum. The charter authorized the association to charge more than ten per centum, and this court declared the act unconstitutional, because it granted to the association an exclusive privilege without the
218 consideration of public services on the part of the association.

The case under consideration is more certainly within the constitutional inhibition, because the terms of the charter expressly excludes any other persons or corporation from the enjoyment of the privileges granted to appellee.

In the Gorden case it might well be said that the privlege was an exceptional or special privilege, forbidden only by the general law, while here it is expressly declared to be exclusive. But whether the privilege is exceptional, special, or exclusive, it appears to be equally denounced by the constitution, as decided in the case of Smith *vs.* Warden. This opinion of this court, January 20th, 1883.

In that case it was held that a special act, giving a clerk a
219 longer time within which to collect his fees than was allowed by the general law to all other clerks, was unconstitutional. It is true, the opinion is not in terms based upon this provision of the constitution, but it is clearly not maintainable upon any other ground, unless it be that the special act was not in the exercise of a legislative authority, and therefore unconstitutional, but beyond the limit of that department of the government, and consequently void, as an arbitrary exercise of power.

Whether that case be founded upon the one or the other of these grounds is immaterial, as both reasons exist in the case being considered for declaring that portion of the act unconstitutional which gives the exclusive privilege.

220 In the case of The Norwich Gas Light Co. *vs.* The Norwich City Gas Co., 25 Connecticut, 1, an exclusive right of this kind under legislative grant for fifteen years was claimed and denied, the court holding that whether it was within the provisions of the bill of rights, which provides that "no man or set of men are entitled to exclusive public emoluments or privileges from the community." The grant was clearly a monopoly, and as such contrary to the whole theory of free government, and, therefore, unconstitutional and void.

Appellee contends that although the grant of the exclusive privilege may come within the constitutional inhibition, it is saved
221 by reason of the fact that it performs a public service by the requirement to erect gas posts at specified intervals for lighting the streets, and for which the company are to receive a specified compensation.

This is no public service within the meaning of the constitution. This charter, in a like manner, regulates the price of gas to be sup-

plied to individual consumers, and reserves, as in the Norwich gas case, the right of individuals to manufacture gas for private consumption on their own premises, and in that case it is said: "But it is no part of the duty of a government to provide the community with lights in their dwellings any more than it is to provide them with dwellings themselves, or any of the necessaries or luxu-
222 ries which may be deemed important to the comfort or convenience of the community."

It may be, with equal propriety, said that there is no more duty on the government to supply lights on the streets by gas, or otherwise, than to furnish such lights for the convenience of the public on the public highways of the State; nor is it any more the duty of the government to furnish such lights than to furnish telephonic, fire-alarm, or telegraphic communications to the citizens. All these matters are of municipal control, under the supervision of the local government, and not in any sense a duty devolving upon the State or general government.

It is not questioned that the Legislature may grant a fran-
223 chise to a corporation or a right to an individual upon the faith of which rights and interests may be acquired, which may ripen into an inviolable contract; but in all such cases there must antecedently exist in the legislative department the constitutional power to make such grant. If the power does not exist, the grant is a nullity, and no rights can be acquired on the faith of it. The grant is void *ab initio*, and is of no more effect than if such legislation had not been attempted. Charter rights in such cases stand exactly on the same basis as the rights of natural persons. The creation of a corporation by legislative act is the creation of an artificial being, which, when brought into existence, must be treated in reference to rights and privileges as a natural person.

224 The cases relied upon by counsel for appellee in support of the doctrine that exclusive privileges or monopolies may be granted, to the exclusion of subsequent control by the Legislature, are all from States where there *is* no such constitutional provisions as that quoted from our constitution—for instance, the Slaughter-House cases, in 16 Wall. from Louisiana, when a monopoly was sustained by a majority decision of the Supreme Court. In the constitution of Louisiana there is no such provision as is found in our constitution, but there is a provision that an exclusive privilege or monopoly shall not be granted for a longer period than twenty years. So in the cases cited from Wisconsin there is no provision, and in reference to the cases from Ohio relied upon by coun-
225 sel for appellee there is not only no inhibition in the constitution against such legislation, but, on the contrary, there is a constitutional provision which by implication authorizes the granting of exclusive privileges. The language of that constitution is that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the Legislature."

The case of The Louisville & P. R. R. C. *v.* The Louisville City Railway Company, 2 Duvall, 175, is not in point, first, because the

question as to whether another railroad as distinguished from a railway could be run under legislative grant on streets over which the railroad had been granted the exclusive right to construct its
226 road was not prevented; and, second, because the grant to the railroad was for the benefit of the Blind Asylum, and was the exercise of a governmental function, and therefore supported by the consideration of public services.

It is insisted that this legislation is not now within the constitutional inhibition, these exclusive grants for ferries, bridges, and turnpikes, and it is sought to justify it upon the same principal. That kind of legislation does not sanction this. It is essentially different in principal. The granting of ferry privileges, the authority to build bridges, and to make turnpikes is the exercise of a governmental function, and usually requires the exercise of the power of eminent domain, and are granted in consideration of certain services
227 to be performed for the benefit of the public.

Such means of intercommunication are necessary in order that the citizen may perform his duty to the government and to facilitate commerce; the *i*sistence of this necessity and the existence of the fact that ordinarily these things cannot be done without the exercise of the right of eminent domain renders it the duty of the government to make the grant, and in doing so it may attach such conditions to the grant as it may deem proper; but in all such cases there is a public service or duty to be performed by the grantee. He furnishes the facilities for communication, which existing necessity made it the duty of the government to do, and is to that extent acting for the government.

228 It is upon the same idea of the exercise of a governmental function and the performance of a service to the public that all the lottery grants in this State have been sustained. In every instance where such grants have passed under review in the courts, and have been approved, they have been created for the ostensible purpose of establishing schools, libraries, or wharves for the public convenience. All these things, when carried out, are public services, and result in the performance of rights and duties which devolve upon the government.

The furnishing of educational facilities, as furnishing communication by which the citizen may perform his duties to the State, is the exercise of gover-mental functions and duties, which
229 may properly be delegated to any person or corporation to be performed for the government, and upon such conditions as the government may prescribe.

It is upon this principle that the grant to the Green and Barren River Navigation Company, in Smallhouse *vs.* McReynolds & Bush, was sustained. The company performed a public service by keeping the public works on the rivers in repair, that facility for commerce, which it was the right and the duty of the State to do.

The theory of all free governments, whether under a written constitution or not, is equal rights, equal privileges, and equal capacities to every citizen in the acquisition of property, and in
230 the preservation of life, liberty, and property. This legislation granting the exclusive privilege violates that spirit as

well as the letter of the constitution, and the construction contended for by appellee, when carried to its logical and legitimate result, would cause incalculable harm.

If this section of the constitution does not apply to this class of legislation, there is nothing in the letter of the constitution to prevent the Legislature from creating any character of monopoly for the a-grandis-ment of a private individual or corporation.

Suppose a general law should be passed forbidding the sale in the State of any given commodity, and an act should be subsequently passed authorizing a particular person or corporation for his
231 or its personal good to trade in this commodity, or in the act itself the right should be made exclusive in terms. Such a grant would certainly be void, and, we think, under the express letter of the constitution; but if not void for that reason, it would be void because an arbitrary and tiran-ical act not within the scope of legislative authority.

It is not true that the courts cannot declare an act of the Legislature "unconstitutional or void" unless expressly forbidden by the letter of the constitution. The constitution divides the government into three departments, legislative, executive, and judicial, and provides that neither of these departments shall exercise any power properly belonging to either of the others. The con-
232 stitution does not undertake to define what the powers or duties of these several departments are, but leaves them to be determined by the maxims of the Magna Charter, and the common law; so that, whatever act of the legislat-e department (which we are alone considering) that is not so approved, is outside of the pale of legislation, and absolutely void. For instance, the Legislature cannot authorize the property of one individual to be taken and transferred to another; it cannot make one an arbiter in his own case; nor can it, under the guise of taxation, confiscate the property of the citizen. Not because any of these things are expressly forbidden in the constitution, but because it is outside of the
233 delegated authority, which is only legislative, and they are therefore a-bitrary and despotic, belonging to no department of any free government.

It appears to us that the act relied upon, giving the exclusive privilege, is likewise outside of the limits of legislation, and for that reason void.

Whether that portion of the act of 1869, giving to the Louisville Gas Company an exclusive right to manufacture and supply gas to the city and citizens of Louisville for twenty years, is unconstitutional, because in violation of the first section of the 13 article of the constitution, or because beyond the authority of legislation as recognized at common law, it is insisted, and we think upon good ground, that the portion of the act of 1869, granting the exclusive right,
234 is repealed by the charter of 1872, granted to appellants.

The 8th section of chap. 68, Gen. Statutes, is as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the

will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed no amendment or repeal shall impair other rights previously vested."

The amendment of 1869 appears to have been passed for no other purpose than that of giving to appellee the exclusive right claimed, since it imposed no new duties sufficient as a consideration to
235 support the grant. The only difference between the acts 1867 and of 1869 is that under the act of 1867 the company was bound — its main pipes when the public and private lights would pay eight per centum profit, while the act of 1869 requires only a profit of seven per centum; and while in the act of 1867 the company is required to supply lights on the streets at actual cost of manufacture, the act of 1869, in addition, provides that each of such lights shall not exceed the price of 35 dollars. As already stated in act of 1867, had been accepted and was being acted under at the time of the amendment of 1869, so that there appears to be nothing to prevent the exercise of the right of repeal reserved to the Legislature by the act of 1856, unless it is the last section
236 of the act of 1869, which provides "that *in* alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the city council and the directors of the Gas Company." There is nothing else in the act of 1867 or of 1869 "plainly expressing," or even expressing by implication, the intention to make the franchise inviolable within the limitations of the act of 1856. This section was clearly not intended to be a limitation upon the power of legislative repeal, but was intended to regulate the respective rights of the city and the Gas Company, so that neither, without the consent of the other, could call upon the Legislature to exercise its right of alteration or repeal. The grant of the "exclusive" privilege for twenty years to manufacture and supply gas does not express or im-
237 ply a restraint upon the legislative power of repeal or alteration any more than the terms of the charter of 1867, which limits the life of the company to twenty years. The inviolability of charters rests upon the ground of executed contracts, supported by a valuable consideration. Here, then, was no consideration, for the Louisville Gas Company had already accepted the charter binding it to the performance of the duties imposed by the amendment of 1869. The act of 1872, incorporating appellant, being in conflict with the grant of an exclusive privilege to appellee, necessarily repeals that portion of appellee's charter, but in no way interfer-s with its rights in other respects.

238 There is another reason outside of the constitutional question that the exclusive right asserted by appellee should not be recognized. If, as insisted by counsel for appellee, the act of 1867 is the grant of a new charter to the old corporation created in 1838, that corporation has the exclusive right for fifty years to manufacture and supply gas to the city and citizens of Louisville. Such a grant of monopoly was not recognized at common law. It is a restraint upon trade, destroying competition, essential to the well-

fare of the public, as in other occupation and business, incompatible with the growing interests and necessities of commercial centers.

We may further say that if it be admitted that the supply-
239 ing of gas on the street, for which the company receives compensation, is the rendering of a public service which would entitle appellee to the exclusive privilege of manufacturing gas, there is certainly no constitutional or common-law reason why the citizens of Louisville should be restrained of their right to purchase that commodity where it can be most cheaply obtained, as that right unquestionably exists in all other branches of trade and commerce.

Judgment reversed and cause remanded, with direction to issue a perpetual injunction restraining appellee from claiming and exercising the exclusive right to manufacture and supply gas to the city and citizens of Louisville.

240 Judges Lewis & Prior of said court delivered the following separate opinion herein:

Separate Opinion of Judges Prior & Lewis.

State of Kentucky, Court of Appeals. 1883, June 16.

CITIZENS' GAS LIGHT CO. *vs.* LOUISVILLE GAS COMPANY.

The court being sufficiently advised rendered the following opinion:

Without entering into the discussion as to the meaning of exclusive separate public emoluments and privileges contained in section one of the bill of rights it seems to us that the question of exclusive rights can have but little, if any, application to a contract made between the State and the citizens, by which certain privileges
241 are conferred by reason of an adequate consideration of which the Legislature is to be the sole judge. Moving from the citizen in undertaking to discharge a public duty or render a public service. In such a case the consideration rendered, or to be rendered, the public will uphold the grant. It is a mere question of contract rights, and both the State and the citizen must abide by its terms, as much so as if it had been entered into between individuals.

The case of the Norwich Gas Company is based on the idea that the State is not compelled to furnish gas to the city, neither is it compelled to improve a particular highway; but when it undertakes to do so and contracts with the citizen to perform the work, it becomes a binding obligation on both parties.

242 The municipality of the city of Louisville being a part of the State government, the necessity of gas lights upon its streets and in its public buildings is almost as essential as the streets that are lighted by it.

It is a public necessity, and when a contract is made to supply this public necessity with gas for a limited and reasonable period, and that does not by its terms create what is termed a monopoly at the common law, the contract is binding. We concur in the conclusion reached that this last charter of the appellee is within the operation of the act of 1856, but cannot adjudge that the grant for a limited

period for an exclusive privilege to the citizen or corporation in
243 consideration of such services as were to be rendered the public in this case is in violation of section one of the bill of rights, nor do we think the cases in this State cited by our associates, where the grant was a mere granting, or was held invalid in the one case at least by reason of its being exceptional legislation, sustained the views presented in the principal opinion.

And again, at the same time and place—"Ordered that the time for filing a petition for rehearing herein, be extended to the first day of the next September term of this court.

Order filing Pet'n for Rehearing.

And afterwards, to wit, at a court of appeals began and held for the Commonwealth of Kentucky, at the capitol in the city of
244 Frankfort, on the 3rd day of September, 1883, came appellee, by counsel, and filed its petition and moved the court for a rehearing of this cause, which petition and motion is submitted to the court."

On motion of appellant, "ordered that twenty days be given it to file a reply to the petition herein."

The petition for a rehearing referred to in the foregoing order is in the words and figures following, to wit:

Petition for Rehearing.

Kentucky Court of Appeals.

CITIZENS' GAS LIGHT CO. *vs.* LOUISVILLE GAS COMPANY.

The far-reaching effects of the judgment rendered in this case, seriously affecting, as it does, the pecuniary interests of almost
245 a multitude of the most meritorious, and at the same time the most defenseless, persons in our community, furnishes us an all-sufficient reason and full justification for asking the court to grant the prayer of this petition for the rehearing and reconsideration of said judgment.

We may be permitted to say, although the fact is not written in the record, that the stock in the Louisville Gas Company is very largely owned by and for women and infant children, and by trustees and executors.

The liberal dividends the company is allowed to make and distribute to the stockholders have attracted many small investments. These dividends have in some instances enabled economical
246 and prudent investors to live in *hare* comfort, whilst in many others they have helped to patch the meager wages and "sair earned penny fee" of women and of children of tender years, both guiltless of incomes of houses or lands or prudently-hoarded bonds and stocks. Already the judgment has produced a heavy decline in the stock.

We do not hope by the foregoing suggestions to excite the sym-

pathy of the members of this court, and thus pervert correct judgment, but we offer them that we may appropriately make the further suggestion that when the confining and the meritorious have invested their small or large estates upon the promises and in-
247 ducements held out in a grant of corporate life, and powers the courts should uphold such grants, and maintain the rights apparently given in them until brought to the clear conclusion that the grant was unauthorized, or had been by constitutional legislation resumed by the powers which made it.

The equal division of this court upon the validity of the grant of exclusive privileges contained in the charter of the Louisville Gas Company, and which is the bone of contention in this suit, justifies us in saying that it is not clear that such grant was unauthorized or has been constitutionally resumed.

Points.

I.

The first point in the opinion delivered by Judge Hines
248 which we desire to notice is the statement that the Louisville Gas Company has no right to tear up the streets of Louisville and lay down therein its pipes and mains, even with the consent of the city council, because the seventh section of its charter granted in 1867, and which gives such right, is expressly repealed by the third section of the act of 1869, amendatory thereof. And upon this theory of the existing provisions of the charter of the Louisville Gas Company the court concludes and declares that the consent under legislative grant to the tearing up of the street to lay down mains and pipes has not been considered essential to the city and to the citizens of Louisville, since the appellee has continued operations without such authority since the 2nd of January, 1863.

249 This is an entire mistake, section 7 of the act of 1867 has never been repealed.

For this error, counsel on both sides are responsible.

We should have called the attention of the court to the fact that there was an error committed by the printer of the Session Acts in numbering the sections of the charter of the 30th of January, 1867.

This arose from treating the preamble of the act as a section, and numbering it section 1. The error thus committed was perpetuated throughout the entire act.

The enrolled act, a copy of which we attach to this petition, corrects the error which crept into the printed act, and shows how the court was misled into stating that the privilege of opening
250 the streets of Louisville for the purpose of laying its mains and pipes granted to the Louisville Gas Company, in the seventh section of the charter of 1867, was repealed by the third section of the act of the 22nd of January, 1867. Section 7 of the printed act is section 6 of the enrolled bill, and section No. 7 of the enrolled bill is numbered section 8 in the bill as printed in the Session Acts.

In the opinion delivered by Judge Hines some stress is laid upon the supposed repeal of said section of the charter.

Although your honors do not seem to have based your judgment upon the assumed repeal of said seventh section of the company's charter, still we do know but that the *the* conclusion reached
251 and announced was influenced and assisted to some extent, at least, by that alleged state of legislation concerning said section, and therefore we have made this correction of the mistake into which the court has fallen upon that subject. And the explination as to the alleged repeal of said seventh section of the charter of the Louisville Gas Company, and of the right of the company to use the streets of the city for the purpose of lighting them for the city and for supplying, by its main and service pipes, the citizens generally with gas as it had undertaken to do *do*, disposes of all the points upon the subjects suggested by the learned counc*i*l for appellant in their oral and written arguments presented upon the hearing of this case.

252 What we have said above upon this subject will also serve to guard your honors from falling into the mistake of supposing that that section of the charter of 1867 (section 4) which requires the company to make an extension of its mains and gas to Portland, *et.*, in two years after the act should take effect, was repealed by the second section of the amendatory act of 1869, which declares that so much of section 5 of the extended charter of the company as requires a profit of 8 per cent. on the cost of extension is thereby repealed, and requires such extension to be made whenever the public and private lights arising from said extension will pay 7 per cent. on the cost thereof. Section 5 of the enrolled
253 act corresponds with section 6 of the act as printed in the Session Acts, and the section repealed and supplied by the second section of the act of 1869 is section 6 in the printed act of 1867, and not section 5 thereof.

II.

We do not in this petition intend to make any extended suggestions upon the proposition that the charter of the Louisville Gas Company, Acts of 1867 and 1869, is a contract between the State of Kentucky and the company, and protected by both the State and Federal Constitutions. We presented our views upon the point, with numerous authorities sustaining them, in our brief "filed when this case was argued," which will be before your honors upon the consideration of this petition. Besides, the question was argued
254 for us long ago by the greatest jurist that ever filled the possition of Chief Justice of the Supreme Court of the United States, in his masterly and unanswered argument delivered in the Dart*h*mouth College case.

The doctrine and authority, and the conclusions reached in that case have been steadily adhered to by the Court, and stand to-day unimpeached, unmodified, and unshaken. As often as the Court has been called upon to pass upon this question the doctrines layed down in that case have been reiterated and reaffirmed.

As late as October, 1881, the Supreme Court, by Justice Miller, said:

"In Trustees of Dartmouth College *v.* Woodard, 4 Wheat.,
255 518, decided in 1819, this Court announced principals on the subject of the protection that the charters of private corporations were entitled to claim under the cause of the Federal Constitution against impairing the obligation of the contracts, which, though received at the time with some dissatisfaction, have never been overruled in this Court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in Fletcher *v.* Peck, 6 Cranch, 87, and the preceding cases, and held that it applied, not only to contracts between individuals, and to grants of property made by the State to individuals, or to corporations, but that the rights and franchises conferred upon private, as distinguished from public, corpora-
256 tions by the legislative acts under where their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair." Greenwood *v.* Freight Company, 105 U. S. R., 20.

In New York *v.* Yard, 95 U. S. R., 113, the Court said:

"Unless forbidden by some exceptional constitutional provision the same authority which can make a law can repeal it. The Constitution of the United States has imposed such a limitation upon the legislative power of all the States by declaring that no State shall pass any law impairing the obligation of a contract. The frequency with which this Court has been called on to declare State laws
257 void, because they do impair the obligation of contracts, shows how very important and far-reaching that provision is." * *

And upon page 114 it is further remarked:

"It has become the established law of this Court that a legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as a basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause referred to in the Federal Constitution."

And in Stone *v.* Wisconsin, 94 U. S. R., 185, Justice Field, in his dissenting opinion upon the subject of the inviolability of charters, said:

"But the charter of a corporation being a contract, a sufli-
258 cient consideration for the privileges and franchises conferred being found in the duties and liabilities assumed by the corporators, the subsequent power of the Legislature is restrained by its terms. This has been so often judiciously declared that it has been supposed to be no longer open to discussion." * * * "The rights and privileges implied in the contract are as inviolable as those expressed."

There is nothing contained in the opinion of the court in conflict with this declaration of Justice Field, nor can any case of that court be found which antagonizes that position. This court has strictly adhered to the doctrines of these cases. We do not recollect a single

case in which it has changed front on this question. It has not done so in this case.

259 Judges Pryor and Lewis uphold the doctrines laid down by the court and uniformly maintained, and we say this not forgetting the cases of Gorden *v.* Winchester, & Smith *v.* Warden, relied upon by Judges Hines and the Chief Justice.

These cases are, we think, distinguishable, as we shall attempt to show, even if they can be maintained as good law.

As late as 5 Brush, in Hamilton *v.* Keith, this court referred to the Dorthmouth College case as "that able, searching, exhaustive, and unanswerable opinion of Chief Justice Marshall." The remarks of the court so unreservedly approve the possition of the Supreme Court upon the subject under consideration that we beg leave to quote the passages.

260 The court says:

"Charters and amendments thereto granted by the Legislature and accepted by the stockholders, and by virtue and on the faith of which their means are invested in the enterprise, constitute a contract between the sovereign public power, and individual stockholders protected by the inhibition found in paragraph 1, section 10, Article 1, United States Constitution, that no State shall pass any law impairing the obligation of contracts; also found in section 20, article 13, of the constitution of Kentucky, being a part of the bill of rights, that no *ex post facto* law nor any law impairing contracts shall be made.

"It has long since, by an unbroken current of decisions of
261 the Supreme Court of the United States, being determined that such charters are contracts within a meaning of the United States Constitution, and withdraw thereby from any impairment by State legislation, beginning with that able, searching, exhaustive, and unanswerable opinion by Chief Justice Marshall in Dartmouth College *v.* Woodford, &c., 4 Wheat., 518, and continued through: Fletcher *vs.* Peck and Gorden *v.* Appeal Tax., 5 How., 145.

"As these were judicial expoundings of the Federal Constitution by the supreme arbitor they are binding upon this court. But were they not so, this court has determined the same thing in the city of Louisville *vs.* University of Louisville, 15 B. Mon., 632, and Gregory's Ex'rs *vs.* Trustees of Shelby College, 2 Mat., 598.

262 And there can be no doubt but such are equally within the recited prohibition and limitation upon legislative power found in the State constitution."

Need we take up the time of this court in arguing to show that the legislature intended that the charter of the Louisville Gas Company, found in the act of 1867, extending the charter of 1838, (or granting said company a new charter, as this court has held) and in the amendatory act of 1869, should become a contract between the State and the stockholders, when the same had been accepted and acted upon by these parties; or that it contains all of the elements and requisites of the valid and binding contract based upon the consideration of public services, and services of a public nature to be rendered
263 by the corporation to and for a large and rapidly growing

city and its citizens. The charter prescribes many duties and obligations on the part of the corporation, and requires it to perform for the city and citizens many important and valuable services.

Let us see if this is not so.

The third section of the act of 1867 requires the company to keep an office in Louisville, and to make and furnish gas to the city and to the residents thereof, and to vend the same.

The fourth section requires the company, within two years after the charter takes effect, to extend the gas distribution to Portland, and to lay down street mains along Portland avenue to the intersection of Third and Fulton streets, and in other streets of Portland.

264 The seventh section requires the company to erect lamp-posts, fixtures, &c., along the street mains, as they are extended at certain specified distances, to furnish gas for and keep the lamps in order and light and extinguish the same. Specifies the illuminating power of each light, and the time the same shall be kept burning, and the cost of gas to the city, and limits the price to the citizens. This section has been repealed by the third section of the act of 1869, and its provisions substituted therefore, which releases none of these services, but makes them more onerous upon the gas company.

The twentieth section of the act of 1869, declares that the company shall be bound to extend its main pipes whenever the
265 public and private lights arising from said extention will pay seven per cent. profit on the cost of such extention.

These references to the duties and obligations laid upon the company are sufficient. The consideration for their acceptance and performance is found in the privileges and franchises granted. Amongst the privileges are the grants of the right and privilege to be a corporation: to enjoy the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuation of the charter, and of vending coal-gas light, and supplying the city and citizens with gas by means of public works, reserving to every citizen the right to erect gas-works on his own premises, and supplying himself with gas. The grants and
266 requirements and obligations contained in said charter are mutual, one being the consideration of the other, and leave no doubt but that the Legislature intended the charter to become a contract between the State and the stockholders. The company could not enjoy the grant of privileges and the franchises given it without, at the same time, obligating itself and covenanting with the State to render all the services and duties required of it by the terms of the charter. And by accepting those franchises, rights, and privileges the company did obligate itself and come under a contract with the State to light the streets with gas so prescribed in the charter, to furnish gas to the citizens at the limited profit
267 specified, to keep the lamps in order, to light and extinguish the same, and to furnish the public lights with gas at actual cost, but in no event should the charge exceed $35 per lamp to the city, etc.

This is the doctrine laid down upon the subject by this court in the case of McReynolds *vs.* Smallhouse, 8 Bush, 447, and these are the common features of all contracts, viz., mutual obligations and considerations deemed sufficient by the contracting parties. There can be no question of the acceptance of this charter by the company upon its very terms and requirements. The company has been, since it went into effect, operating under it, as shown by the pleadings in the case.

268 Now we respectfully submit, that we have shown beyond question, that the charter of the Louisville Gas Company was intended by the Legislature to become a contract between the State and the stockholders of the corporation when accepted and acted upon, and that it did become a contract between said parties by its acceptance and use for the purpose of its enactment; and, therefore, this charter and contract is under the protection of both the State and Federal Constitutions, which equally denounce all laws which impair the obligation of contracts.

We have said that the case under consideration, and the cases of Gordon *vs.* Winchester and Smith *vs.* Warden (manuscript
269 opinion), were distinguishable—they are entirely different. In those cases there was no consideration given for the privileges granted. In neither case was the grantee "bound to render any service whatever to the public, or to any member of the community," so said the Court in the first named of said cases.

The grant to the corporation in Gordon *vs.* Winchester was simply a privilege to loan money at a special and greater rate of interest than was allowed to the people generally; and in the case of Smith *vs.* Worden, the clerk was given a longer time to collect his fee bills than was prescribed in the law applicable to the community generally. But in this case the Louisville Gas Company
270 in consideration of its grants were obliged to light the streets of Louisville, extend its mains, light, take care of, and extinguish the public lights, and to do many other valuable, important, and necessary things for the city of Louisville and the public.

Much of the reasoning of the court in the case of Gorden *vs.* Winchester is unquestioned; but we do not think the conclusion reached by the court upon the question of the validity of the grant to the building association has received the approval of the bar of this State. The grant to the corporation of the right to loan its money at a rate of interest not exceeding ten per cent. per annum might
271 have been sustained upon the ground that it was not a public privilege or emolument, but merely a special privilege for the exercise of a private right, and therefore not interdicted by the first section of the bill of rights of our Constitution; and, moreover, it seems to us that said case has received a black eye in the case of the Commonwealth *vs.* Whips. The lottery privilege to Whips was sustained by the lower court and affirmed by the equal decision of this court, and the opinion of the two judges who agreed with the Jefferson circuit court became the law of the case upon that point. Smith *vs.* Brannin, 79 K'y, 119.

In view, therefore, of the dissatisfaction felt by the bar of this State

with the decision in Gorden *vs.* Winchester and the modifica-
272 tion of its extreme doctrine by the later and more carefully considered case of Commonwealth *vs.* Whips, we cannot accept the former case as reflecting the settled law of this court upon the subject of the validity of the grant of such privileges as were condemned thereby.

III.

As regards the character of the services required to be rendered by the Gas Company in behalf of the city and citizens of Louisville in consideration of the franchises and privileges granted it this court is equally divided. Judges Pryor and Lewis regard them as a public necessity and as public services, while the chief justice and Judge Hines say that they are not public services in the meaning
273 of the Constitution, and that therefore the exclusive right of manufacturing and vending coal-gas lights to the city and citizens of Louisville is a violation of the first section of the bill of rights of the constitution of Kentucky, which is in the following words, viz:

"That all freemen when they form a social compact are equal, and that no man or set of men are entitled to exclusive, separate emoluments or privileges from the community, but in consideration of public services."

With profound respect, we contend that the services required of the Gas Company are public services in the meaning of the first section of the bill of rights of the constitution of Kentucky.
274 They consist in furnishing gas and lighting up the streets, wharves, engine-houses, city hall, city offices, council chambers, and other public property of the city, taking care of and extinguishing the public lights, and in supplying lights to the community generally in their dwellings, churches, places of amusements, public and private parks, railroad depots, telegraph and printing offices, manufactories, hotels, etc., at limited prices.

It cannot be questioned that these services are all public in their nature, and are, in fact, public services, as affecting both the municipal government of Louisville and the entire community. We
275 understand and we contend, with all due deference to the opinion of the court, that any service, the performance of which is essential to the public welfare, or which is advantageous to, or promotes the business interests and transactions of the public, is a public service in the meaning of the constitution; that the agreement to render such services will uphold a grant of exclusive privilege from the Legislature; that it is the duty of the government to encourage the discharge of such services by holding out reasonable inducements to those who will undertake to render such services to the public, and we believe this position is sustained by authority, and is maintainable upon principle.
276 The first authority we quote upon this point is the separate opinion of Judges Pryor and Lewis in this case. They say:

"The municipality of the city of Louisville being a part of the State government, the necessity for gas lights upon its streets, and

in its public buildings, is almost as essential as the *the* streets that are lighted by it. It is a public necessity, and when a contract is made to supply this public necessity with gas, for a limited time, and that does not by its terms create what is termed a monopoly at the common law, the contract is binding."

Now, it is clear, that these judges thought the grant to the Gas Company of the exclusive privilege, before mentioned, was for
277 a reasonable period, and that it did not create a monopoly at common law, and if the gas for the streets was a public necessity, the conclusion is inevitable that who ever administered to that public necessity, and relieved that public want, rendered a public service in the meaning of the Kentucky bill of rights.

In the case of Patterson *vs.* Tribue, 3. J. J. M., 598, it appeared that the Legislature had granted to Trabue and others the exclusive right to appropriate, at any time within two years, not exceeding 5,000 acres of the public lands situated within five miles of the place where they were boring for salt water upon certain conditions, one
278 of which was, that they should not interfere with any actual settler at the passage of the act, and two hundred acres around and including the settlement in the center. The act was dated December 27th, 1820, and on 7th Dec'r, 1822, its provisions were continued in force. In March, 1822, Patterson caused a survey to be made for 80 acres, in virtue of a land warrant, within less than five miles of the place where Trabue, etc., were boring for salt water. In April, 1823, Trabue filed his caveat to prevent a patent issuing to Patterson. In November, 1823, the court decreed in favor of Trabue, and Patterson appealed.

Amongst other things, it was contended that the act, in favor of Trabue was a violation of that provision of the constitution
279 which prohibits the granting of exclusive privileges.

The court said that the argument in support of that position was not sound, and, amongst others, gave as reasons for sustaining the grant to Trabue, these: "That by the reservation 5,000 acres Trabue was encouraged to persevere and expend his money in pursuit of salt water, the finding of which is of public utility and public advantage." In this case, your Honors see that the public service rendered for the exclusive grant was only and simply the advantage and benefit the community would receive from the supply of salt water obtained through the labors of Trabue. At the early day of the grant to Trabue salt water was regarded as
280 a public necessity, the finding of it was regarded as a public service, and all this is apparent from the facts presented in the case, and from the reasoning of the court. This case is a judicial construction of the terms "public service," occuring in the first section of the bill of rights. The language of that section in the constitution then existing is the same used in the present one.

We think the same view of the constitution on this point was held by the court in the case of O'Haro *vs.* Lexington and Ohio Railroad Company, 1 Dana, 230, when a privilege of appropriating the land of individuals to their exclusive use was granted to
281 that corporation. The damages were ascertained through an

inquest, which was approved by the county court and appealed to this court. It was objected—

First. That the act of incorporation granted exclusive privileges without any consideration of public service.

But the court overruled the objections, and said, in reference to the consideration, that is, the public service to be rendered for the grant, "that public utility was the chief object of the act of incorporation."

It is true that the court also said that "in the true sense of the constitution no exclusive privilege had been granted to the corporation," and used this language:

282 "If the charter be on that ground unconstitutional, it would be difficult to maintain the validity of any statute for incorporating any bridge company or any bank, or even for granting any ferry franchises."

But the court did not base the opinion upon that ground alone. The chief justice (Robertson) clearly intended, by the passage first quoted, to meet the objection, that the grant had no consideration of public service to sustain it, and to show that such a service as contributed to the "public utility" was a public service in the meaning of the first section of the bill of rights.

In Gorden *vs.* Winchester *etc.* the court meant, we think, to lay down the doctrine, that a public service was one which
283 was demanded by the public convenience, and did not intend to limit the definition of such a service to the keeping of a tavern, ferry, toll-bridge over a stream where it is crossed by a public highway, or to building a mill-dam across a navigable stream, for the mention of these special matters is followed by the words, "and the like;" and they were special only to show that that is a public service, in the performance of which the public has an interest, or which is demanded by the public convenience. We make a quotation from the case:

"Permission to keep a tavern, or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to
284 build a mill-dam across a navigable stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the Legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service, to secure which the grant was made; and such obligation, on the part of the grantee, is just as necessary to the validity of a legislative grant of an exclusive privilege as a consideration, either good or valuable, is to the validity of an ordinary contract.

"Whenever, by accepting such privilege, the grantee becomes bound by an express or implied undertaking to render ser-
285 vice to the public, such undertaking will uphold the grant, no matter how inadequate it may be, for the Legislature being vested with power to make grants of that character, when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered, and the courts have no power to interfere, however

inadequate the consideration or unreasonable the grant may appear to them to be. But when they can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any manner in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void, as
286 contravening that provision of the bill of rights which prohibits the granting of exclusive privileges, except in consideration of public services."

Now, it seems to us that serving the interest or convenience of the public—that is, the community—or relieving their wants or supplying their necessities is the test prescribed by Judge Cofer by which to try the validity of a grant of a special or exclusive privilege, and that the court did not intend to exclude from the list of public services any one which was necessary to the public welfare, or which was demanded by the public convenience. The use of the words "and the like" in the sentence shows, we think, that any
287 service other than those named, affecting the interest and welfare of the public, should be regarded as a public service in the meaning of the constitution. This view is strengthened by the reference, in a subsequent paragraph of the opinion, to the services which incorporated banks were bound to perform for the public and for individuals in consideration of the privileges granted them. Clearly the court regarded "those certain services," which were only the accommodation and convenience of the public in exchanges, loaning money, discount of notes, and other financial affairs, as public services in the meaning of the bill of rights, and sufficient to sustain the exclusive and special grants.

288 The illustration of the point which the court was representing by a reference to banking corporations could only mean that the services such institutions were bound to perform for the public and individuals were public services in the meaning of the provision of the constitution then under consideration.

In the case of Shepherd *vs.* Milwaukee Gas Company, 6 Wis., 546, the court clearly held that the business of manufacturing and furnishing gas for lighting the streets, places of business, and dwellings of Milwaukee was not a mere private and ordinary business, and that from the nature of the article the objects of the company and their relations to the community, etc., the company was
289 not at all analagous to any ordinary manufacturing or trading corporation, and the court said also that the success of the business of the company "seriously affected the public policy and individual convenience of the intermediate community;" and that the successful operation of the "gas company worked a radical change in the mode of lighting the streets, dwellings, and places of business in the city, and created thereby a sort of necessity for the article, to produce which the exclusive privilege was conferred upon them, and hence they assumed the correlative duty of supplying the necessity." Now, in the reported cases we have cited, and in the opinion delivered by Judges Pryor and Lewis in this
290 case, it is indisputable, we think, that the conclusions reached were based upon the proposition that a public service in the

meaning of the constitution is one which meets and relieves the wants and necessities of the community, and answers the demands of public convenience. And such a service is a sufficient consideration for a grant of special or exclusive rights and privileges by the Legislature. We repeat here that in the separate opinion rendered in this case, and also in the Wisconsin case, the public necessity for gas lights on the streets is distinctly declared in the most emphatic terms, Judges Pryor and Lewis saying that gas lights are
291 almost as essential as the streets that are lighted by them.

In another place we mentioned some of the services the Gas Company was bound by its charter to render to the city of Louisville and its citizens in consideration of the privileges granted it. In setting out those services we necessarily specified the uses to which the gas was put in the discharge of those duties and obligations. The bare mention of those services and uses manifested the necessity and demand of gas for both the public and individuals, and for the regular and prompt supply of the article for the streets, wharves, public buildings, hotels, churches, manufactories, places of
292 public amusement, and all buildings in which the business of the community was carried on and transacted by night as well as by day, such as a telegraph, telephone, hotels, and printing offices.

Neither the municipal government of Louisville nor the community, as a body, nor the individual members of the community could now dispense, nor could they in the last forty years have dispensed, with the services rendered them, respectively and collectively, by the appellee.

This court knows that a very large amount of business is transacted in the city of Louisville during the night-time, and that the hours of recreation of its hard-worked commercial, professional, and manufacturing community are after the sun has ceased to
293 give its light, also that a large portion of the passenger traffic passing through the city is transferred from one depot to another during the hours of the night. The gas on the streets and in the depots is absolutely necessary for the safe and convenient discharge of all these duties, services, and employments, and for lawful amusements.

We need not press the court with further suggestions as to the absolute necessity for gas for the city and community.

The supply of these demands and wants and relief of these necessities of the public is a public benefit, and the most important public service.

It is upon the principal of public benefit that individuals and corporations have been granted the privilege of taking pri-
294 vate property for the purpose of making public highways, turnpike roads, and canals, of erecting and constructing wharves and basins, of establishing ferries, telegraph lines, and electric light companies, of draining swamps and marshes, and of bringing water into cities and villages. In all such cases this object of the legislative grant of power is the public benefit derived from the contemplated improvement and the relief thereby of a public

want and necessity. And so we find that the universal principal and consideration for all grants of special or exclusive privilege is based upon public necessity, public utility, public benefit, and public convenience. Can any one say that gas for the city and
295 its citizens is not a necessity, and that its supply is not a public necessity? It is only less necessary than the supply of pure water which has been brought to the city by a corporation. It is more necessary than salt water was in 1822, or when the small quantity of O'Hara's land, taken in 1830 for the purpose of constructing a railway, or then any turnpike road, that could now be constructed.

The streets of Louisville are its highways. That it is a governmental duty to make the highways safe is universally admitted. The gas is absolutely essential to the safety of the streets. Remove the gas posts and gas lights and our highways would become the prey of robbers, thieves, and thugs, and no one could be safe
296 in passing along them. Commerce would be subject to the depredations of the vicious classes of a metropolitan population, and life itself would be exposed to continual hazard of violence. We boldly assert that it is the duty of the government, by its own agents, or through the medium of individuals or corporations, to provide for the safety of the streets and the security of life and property. And we do not hesitate to say that, upon the principal of safety to the community and benefit to the public, it would be the duty of the Government to place lights on all the highways of the State, were it necessary to do so, to secure the safety of life and property or to the transaction of the business of the
297 country. If, for instance, the demands of business were such as to require that the commercial or agricultural or manufacturing commodities of the country be transported at night as well as by day, or if, in the prosecution of their affairs, it was necessary that men should travel along the highways during the hours of night, we do not hesitate to say that it would be the duty of the government to place lights upon the highways in order to provide for the security of commerce and to meet the wants and necessities of the public, or to cause those services to be performed by granting to others the privilege of rendering them; and the grant of special privileges for a reasonable time to individuals or corporations
298 for such services would be constitutional, because based upon public services.

Now, the supposed state of case just presented is the real state of case in this city. Much of the business of the community is necessarily transacted by night. The people, in the transaction and prosecution of their business, or in the lawful indulgence of their right to seek their churches or places of amusement, or of the no less important discharge of sacred duties and obligations, are compelled to use the streets of the city at night. With entire respect, we urge that it is the right and duty of the government to see that the streets are made safe, and made secure for all these purposes and
299 lawful uses of the community. Does not the person who performs such service render a public service?

The principle we are contending for has been established by the General Government. It recognizes its duty to the public of lighting up the harbors, coasts, lakes, and navigable rivers in the interests of commerce, and this court knows that lights have been placed upon the Ohio from its sources to its mouth, and also on the Missouri and Mississippi and other navigable streams of the country. These are our water highways, but they are highways as much so as the highways on land, and the Government recognizes its duty to the public by supplying lights along the shores to point
300 out dangerous reefs, shoals, snags, and bars, and to indicate where vessels should run. The duty of the Government in reference to both is based upon the same broad principle of public benefit and public utility.

This court has distinctly recognized and declared its right to improve the navigable streams of the State, and its duty to do so for the public benefit, and to make contracts and grant privileges to those who will perform such services. Com'rs Sinking Fund Company *vs.* Green & Barren Riv. Nav. Co., 79 Ky., 78. We cannot see why the improvement of the highways of Louisville, and making them safe for the use of the people and their business, by lighting them up with gas, is not a duty of the government, and a pub-
301 lic service by whomsoever performed in the meaning of our constitution, as much so as lighting our water highways, navigable streams, ocean coasts, etc., etc.

In the Chicago warehouse cases, otherwise called the "Granger Cases," the underlying principle, upon which the Supreme Court held that the State of Illinois had the right to regulate the charges for services, was the public good. The court thought the employment of the warehouse men was a *quasi*-public employment, and that the property in the business was affected with the public interest, and was thereby brought under the general power of control which the State possesses in the case of other public employments. There is more reason to say that the employment of the Gas Com-
302 pany, so far as concerns furnishing the city and the streets and public places with gas, extending the area of gas lighting and lighting, taking care of and extinguishing the gas in a public or *quasi*-public employment, and the property in the business is affected with a public interest because the charter makes it the duty of the Gas Company to furnish gas to the citizens at a limited rate of profit; and every citizen may demand a supply of gas upon complying with the reasonable rules of the corporation, and the company cannot refuse it. Independently of the charter obligation of the company to furnish gas, the exclusive privilege it has of
303 manufacturing and vending gas in Louisville would impose such an obligation upon it. Shephard *vs.* Milwaukee Gas Light Company, 6 Wis., 546; Gas Light Company *vs.* Colliday, 25 Md., 1; People *vs.* Manhattan Gas Company, 45 Barb., 136.

Therefore we regard the employment of the Gas Company as a *quasi*-public employment, and properly as having required a *quasi*-public character. No question of the power of the Legislature as to regulating the price to be charged by the company for gas is now

before the court. Hence we do not pursue this suggestion any further.

We have, we think, said enough on this point. To our minds, we have established the proposition that the lighting of the
304 streets of Louisville and public places, and other services rendered for said city, are an absolute public necessity; that the public welfare demands them; that the true test of a public service, in the meaning of the first section of the bill of rights, is the public benefit and needs, and that that service which contributes to the public good and relieves the public wants and necessities is such a service as is contemplated by the bill of rights. We may add that those acts and services which constitute "public services," in the meaning of the constitution, cannot be catalogued or inventoried, nor can they be limited, except by the wants and necessities of the community. The list of public services has kept even pace
305 with public wants, and will keep abreast of them. Some things which were of public necessity in the past are not so now, and others which were not essential heretofore are required to-day to meet the public wants. We may instance gas, water-works for introducing water into villages and cities, telegraph and telephones. The country and the public cannot now dispense with any one of them more than they can with common carriers or railroads. The distress and embarrassments occasioned by the telegraphers' strike only a few days ago show how absolutely necessary to the present demands of the public is the telegraph system. There is a strong advocacy for a system of postal telegraphy, and the
306 right in the Government to establish one is based and claimed upon the same grounds that the postal system itself is placed, to wit, the public necessity and public good. But a few days ago, when the country was almost convulsed with apprehension because of the telegraphers' strike, the public prints were full of articles upon the subject. We copy from one of the most important and influential journals of New York a portion of an article upon the subject, as follows:

"The function of the telegraph in our highly-organized commercial life has come to be as general and as important as the mail. In some respects it is even more of a necessity. Business could no more be accomplished without it now than without the railway
307 or steamship. Not only is it an indispensible instrumentality in ordinary exchange, but it is absolutely necessary for the safe and sure administration of the railways themselves. It is a public employment like that of the police or the gas and electric light companies, or the railroads," etc.

This language is equally applicable to the system of public lights by gas, now employed in all the large cities of this country. It cannot be dispensed with. It is a necessity in our "highly-organized commercial and social life, and has become as general and as important as the mail." So long as our civilization progresses and develops, so long will new public wants and necessities arise,
308 and as long as this continues, so long will it be the duty of the Government to see that these wants are properly met,

either by its own agents or through the medium of individuals and corporations charged with the performance of the duties and services which it would be proper and the duty of the Government to render to the public. We cannot sit down and say that such and such things are public services and then close the list against other situations which may create a public necessity for other things and other services. We cannot close the schedule until our civilization has fully culminated and turns back upon itself, and, therefore, it is impossible, we think, to prescribe any rule for ascertaining
309 or determining what is a public service, or to limit the constitutional meaning of the words "public services," except by the wants and necessities of the public, carefully distinguishing as we now do in our minds between the community generally and the individuals composing it; between the public wants and public good and mere private convenience and benefit.

Before leaving this point we wish to notice the Norwich Gas Light Company, 25 Conn. p. 19, relied upon by Judge Hines and the chief justice to show that the services required of and rendered by the Louisville Gas Company to the city of Louisville and its inhabitants are not public services in the meaning of the first section of
310 the bill of rights of the constitution of Kentucky.

We do not intend to dodge this case. We shall admit all the force and point there are in it. If there is any case in the books that favors the proposition that the business of furnishing gas and lighting the streets of a large city, extending gas mains, etc., and furnishing lights to all who may demand them, is but an ordinary business—like manufacturing leather for instance—and not a public service, it is the case named, and it is also the only case so holding that we have found. But we do not think it covers the entire proposition, or sustains the court to the extent it is relied upon.

311 It is true that it was said in that case that the making and selling of gas was an ordinary business like the manufacturing of leather, or any other article of trade. But it will be borne in mind that the Norwich Company did not become bound, or agree to make gas, or to suffer the gas which they might make to be used.

They were restricted in the price of what they might sell, but there was no provision that they should sell to all, or to any one who might apply for it, or to so many as they might be able to accom-odate, or that it should light the streets. So that we see that there was no consideration, as said by the court, either of a public
312 or a private character, reserved for the grant; and, therefore, that case and the one at bar are simply the antipodes of each other. The statement of the court that the making and selling of gas was an ordinary business, etc., was based entirely upon the facts appearing in that case, that the company was not bound in any way to make or sell gas to anybody, or to the city, or to light either the streets or dwellings.

Had the company been bound to furnish gas to the citizens, to extend the area of gas lighting, to light up the streets and public places of the city, and to light, take care of, repair, and extinguish the public lights, in all probability the court would not have charac-

terized the business as like the manufacture of leather or any other article of trade. And besides the rulings of the court are
313 contradicted and opposed by the latter and better considered case of Shephard *vs.* Milwaukee Gas Light Company, *supra*, and also by the cases of Gas Light Company *vs.* Colliday, 25, Md., p. 1., People *vs.* Manhattan Gas Light Company, 45 Barb., 136. It is also true that the court said that it was no part of the duty of the government to provide the community with lights in their dwellings. We grant that it is not. But the case does not say that if the company, in consideration of the exclusive privilege of manufacturing and selling gas in Norwich, had bound itself to extend the area of gas lighting, to erect posts and furnish lights for the city, light, take care of, and extinguish the public lights, that would not have
314 been a public service.

Such a contract for a reasonable time would have relieved the company of the crime of being a "monopoly," which was one of the grounds upon which the court put its adverse decision. Nor does the court say that the government had not power to grant an exclusive privilege to supply gas for a reasonable time to said city and its citizens. The trouble in the case was that there was no contract and no service, whether public or private, for the exclusive grant made the corporation. And further than this the bill of rights declared "that no man or set of men are entitled to exclusive public emoluments or privileges from the community," not
315 even in consideration of public services. But as we said the court did not seek any aid from the bill of rights. So that we think it is palpable that the Norwich case is not in any feature or element or provision of its charter like the case at bar, and therefore it cannot be regarded as an authority upon which to lodge the ruling, that the services rendered by the Louisville Gas Company are not public services in the meaning of the constitution. But if the court should entirely differ with the views of this case, entertained by us, we can only reply, there cannot be found another case to support its novel possitions.

IV.

316 As to the consideration for the grant of exclusive privilege to the Louisville Gas Company—

There was both a consideration for the grant, and one which, if measured by its money value, was sufficient, as a consideration, to support the grant.

We beg leave to correct the statement made in the opinion of the chief justice and Judge Hines, as to the consideration given by the Gas Company for the exclusive privilege contained in the fourth section of the act of 22nd January, 1869.

Besides the agreement to absolutely extend its mains whenever the public and private lights would pay a profit of 7 per cent. on the cost of such extensions, and the agreement to furnish gas to the city at a sum not exceeding $35.00 per lamp, no matter how
317 much in excess of that sum each lamp might cost the company, the company yielded the right granted in the act of

1867 to charge private consumers the average price charged the private consumers in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, and agreed that thereafter the charge for gas to private consumers should be so graded that the company's profits should not exceed 12 per cent. per annum on the par value of the stock, ten per cent. only of which might be distributed to the stockholders in semi-annual dividends, the other two per cent. to be laid out for extensions, and not to be capitalized except at the end of every five years. And the company also agreed to
318 become and act as the permanent trustee of the city's stock, and to invest all unused dividends belonging to the city, and to hold the same as a permanent trust during the continuation of the charter.

By this amendment, therefore, the public gained four things which were surrendered by the Gas Company, viz:

First. The extension of gas when consumption, public and private, would pay 7 per cent. on cost of extension. This was a valuable concession to the public interests and a corresponding disadvantage to the corporation.

Second. The city got its lights at actual cost, with a provision that it should not pay more than $35.00 per lamp, no matter how
319 much it might cost the company to supply each lamp. This was a valuable concession to the city and public.

Third. There was provided an absolute fund of two per cent. per annum of the profits the company was allowed to make for extension of mains and area of gas lighting, and the company was bound to use the same in extensions, and were prohibited from making capital of it, except at the end of periods of five years. This was a very valuable concession and an important provision looking to the accommodation of the community. This two per cent. was to go into extensions, whether such extended area of the business did or did not pay any profit. This provision had the effect of push-
320 ing the mains and service pipes out upon the thinly settled streets, and stimulated thereby the growth and expansion of the city, thus enhancing the value of and bringing into market the outlying and remote lots. All of this was a large benefit to the public and a disadvantage to the company.

Fourth. The effect of the limitation of the profit which the company was allowed to make was that from charging $3.15 per thousand feet, which was the price when the amended act was passed, the price was reduced to $2.85 per thousand, and under the operation of the graded charge and limited profit prescribed in said act the price of gas to private consumers has been reduced to $2.00 per thousand, and with the increased consumption accom-
321 pan-ing increased population and increased extension of the area of gas lighting the price will be continually graded down.

The more important and valuable considerations given by the appellee for the exclusive privilege granted by the act of January 22, 1869, were overlooked in the opinion we have been considering. The average price of gas in the cities named in the act of 1867,

was, at the time the company was limited to a profit of 12 per cent. on the par value of the stock, more than $3.15 per 1,000 feet.

It will be seen at once that the limitation of the rate of profit upon the par value of the stock, and the prohibition against capitalization contain- in the act of 1869, were large concessions on
322 the part of the company, and operated as a material factor in reducing the price of gas. No matter how valuable the stock became—and it did become of more value than par—the profits of the company must be estimated on the par and not the market value of the stock, and only every five years were the company allowed to make additional capital stock, upon which dividends might be declared.

It seems to me that these were very valuable considerations, which were, even in a pecuniary point of view, sufficient for the *sufficient for the* exclusive privilege granted the company by the act of 1869. We further suggest, upon the point of the consideration for the exclusive grant to the appellee, that we do not think this
323 court can measure the value of the consideration given for a grant by the Legislature, or weigh that which is granted on the one side and undertake on the other to ascertain if one be the equivalent for the other, or a sufficient consideration commercially considered to sustain the legislative contract. The adequacy of the consideration is to be judged of solely by the Legislalature, and that body satisfied, the courts cannot condemn its act upon any supposed inadequacy in the consideration. Gordon *vs.* Winchester, 12 Bush., 115.

We contend that there was a consideration, and an adequate one, for the exclusive grant made in the act of 1869. That grant was not, as the court seemed to think, a gratuity. As a matter of
324 fact, which is shown by the record in this case, the act of 1869 had not gone into effect when the provisions of the act of 1867 were settled upon between the company and the city government of Louisville. The amendment actually passed the boards of the general council before the 1st January, 1869, and before the Gas Company had done any act under the act of 1867, and the company, before and at the time of putting the act of 1867 into operation, believed, and acted upon the belief, that the exclusive privilege and the other provisions of the act of 1869 would be granted by the Legislature. And it was, both by the city and the Gas Company, from the time the amendment was agreed to by the council, considered as if it had been originally incorporated in the act of 1867.

325 V.

As to whether the exclusive right to manufacture and sell coal-gas lights is an exclusive, separate public emolument or privilege, in the meaning of the first section of the bill of rights, this court is referred to the full argument on that subject presented in the brief of Mr. Caldwell in the case of Commonwealth *vs.* Whips, a copy of which is present- herewith, and the opinion of the court in that case is relied upon as authority.

VI.

We come now to the one point upon which the court concurred, and upon which the reversal of this case was based.

The court has held, without division, that the fifth section
326 of the act of 1869, amending appellee's charter, which gives the exclusive right of manufacturing and vending gas in Louisville, is within the provisions of the act of February 14, 1856, and was repealed by the charter granted by the Legislature to appellant in 1872. The eighth section of the act of February 14th, 1856, is as follows:

"All charters or grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal, at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

327 We earnestly contend that the charter granted the appellant does not repeal or destroy the exclusive privilege contained in the charter of appellant, because it and all of the charter is exempted from the provisions of the eighth section of the act of February 14th, 1856, and protected from appeal or annullment by the provisions of the sixth section of the act of 1869, the act which grants the exclusive privilege.

Said section reads as follows:

SEC. 6. "That no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the city council and the directors of the Gas Company."

This amendment became a constituent part of the charter of the Gas Company just as much as if it had been originally in-
328 corporated with it, and is to be read as if originally a part of it. (2 Duvall, 175.)

The court will still bear in mind that the act of 1869 amending the charter of the Gas Company was the result of a good deal of consultation and negotiation between the city council of Louisville, representing the general interests of the city and the citizens, on the same hand, and the directors of the Gas Company, representing the stockholders, on the other. The title of the act of 1867 shows all this. The record shows that both parties sent a committee to the Legislature asking that the additional provisions embraced in the amended act be incorporated with and made a part of the charter of the Gas Company, which was promptly acceeded to *to* the
329 the Legislature. The city council regarded the concessions made by the company upon the subject of extensions of mains and area of gas lighting, the limitation upon the price the city would in any event have to pay for gas, and the graded charge for gas to private consumers so that the company's profits would not exceed 12 per cent. per annum on the par value of the stock, the prohibition as to capitalizing two per cent. of said profits except at the end of every five years, and the investment of said surplus in the

meantime in the extensions of mains, etc., as the full equivalent of the exclusive right to manufacture and vend coal-gas lights, as provided in section five of said amended act, and that body, in view of the advantages it was to derive through the *exposed* amendment,
330 was anxious to have this agreement accepted by the Legislature, and made secure and permanent for twenty years hence, the resolutions of the council adopting, and the appointment of committees to ask the Legislature to enact their agreement into a permanent law. The action of both parties leaves no doubt as to the wish and purpose of the Gas Company and the city councilmen to throw around said amendment such guards and conditions as should secure the charter from amendment or repeal, except by concurrence of both.

And now we ask, is it not manifest, that the sixth section of the act was designed to prevent any alteration, amendment, or repeal of the charter, unless both the company and the council con-
331 curred therein? Could any other words than those used, more plainly express an intention on the part of the Legislature, for the words used are the words of that body, that the charter of the Gas Company should not be altered by the body, which alone could alter or repeal it, unless the parties that asked for the legislation should also concur in asking the Legislature to amend or repeal it? If your honors were intending to convey the idea that the thing you were doing should remain in the condition you had put it, unless A and B should concur in requesting you to change it, could you more plainly declare that intent than by saying there shall be no alteration or amendment of this act without the concurrence of those parties? Unless the Legislature intended to re-
332 strain the alteration, repeal, or amendment of the charter, except upon the condition expressed in section six, then that section is without effect or meaning, because, if the section had been entirely omitted, the right to repeal, alter, or amend the charter clearly existed under the provisions of the eighth section of the act of February 14th, 1856, and consequently the unquestionable right also to refuse any legislation touching it, which was not concurred in, and requested by both the council and the company. Therefore the act, according to the construction put upon it by the court, gives no legislative rights that did not exist independent of it, and effects none that did exist without it.

333 The act does not pretend to interdict either the company or council from exercising the constitutional right enjoyed by every citizen of the State, of calling upon the Legislature for such legislation as was or might be considered necessary and proper. But the Legislature did declare that it would not alter or amend the legislation it had granted those parties without the concurrence of both. The court knows that neither the council or company had any right to amend, alter, or repeal the charter—that this power rested alone in the Legislature; therefore it must be that the interdiction of any alteration or amendment of the charter of the company, without the concurrence of the company and council, was

addressed to and laid upon that body, which alone could
334 alter, amend, or repeal it, viz., the Legislature.

If the Legislature intended to leave its right of appeal, alteration, and amendment as if existed by virtue of the provisions of the act of the 14th of February, 1856, it certainly would not have introduced any provision upon that subject,—because it would have been utterly unnecessary. It would have rested on the act of 1856. Nor could we conceive that the Legislature adopted, or deemed it necessary to adopt, the sixth section of the amended act of 1869 in order to so regulate the respective rights of those parties, that neither of them should, without the consent of the other, call upon the Legislature to exercise its right of alteration or amendment. We do not suppose it has ever occurred that the Legislature did
335 or thought it proper or necessary to pass an act for such a purpose. If, however, such was the purpose of section 6 in the act of 1869, it fails, and must utterly fail, of accomplishing such purpose. And we think it is not expressing our views too strongely or overstepping professional propriety and respect, or a*mus*ing a*nd* untenable political or legal position, to say that any act which forbids any citizen from calling on the Legislature for needed legislation would, under the constitution and laws, be an act of tyranny and usurpation of legislative power and authority. We must therefore find some other reason than that assigned by the court for the declaration of the Legislature that there should be no alteration
336 or amendment to the charter of the Gas Company without the concurrence of the company and city council. There is but one other intelligent reason that is at hand consistent with the language used in the sixth section of the act of 1869, its title, the history we have given of the origin of that act and the objects to be effected by said section, and that is, that the Legislature intended thereby to plainly assure the parties that the charter which had been made entirely satisfactory and acceptable to the council of the city of Louisville, representing the local public, and to the company, representing the stockholders thereof, should not be amended or altered or repealed unless by the wish of both.

337 We are unable to construct the sixth section of the act of the 2d of January, 1869, as the court had done. With entire respect to this honorable and learned court, we think that it has given a construction and meaning to the sixth section of that act which cannot be maintained upon any rule of construction known to the law. The section cannot be redeemed to the meager and utterly unnecessary purpose ascribed to it. It is to receive consideration, as well as the other sections, and be made to stand and perform some duty, purpose, or office in the statute, if possible. But the court, by its construction of its provisions, has, as we have argued, shorn it of all office and effect, and made it a mere excrescence and deformity on the otherwise valuable and important
338 provisions of the act. The natural and popular meaning of the words of the act is the only one intended by the Legislature, we are sure. We can best ascertain the true meaning—and the one intended—of these words by looking at the provisions of the

act of 1867, upon the subjects embraced by the amendment of 1869. At the time said amendment was passed the Gas Company had the right to demand from private consumers of gas a price equal to the average price of gas charged such consumers in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis. It was not bound to make extensions of its main pipes for the purpose of distributing gas (other than as was provided in the fourth section
339 of the act of 1867, which required an extension to Portland in two years after the charter took effect) until the private and public lights required by the citizens would pay eight per cent. profit on the cost of extension. Such being the case, and a modification of the provisions of the charter in reference to those matters being concerned and asked for by the general council of Louisville and the Gas Company, the Legislature said to the company, if you will give up the provisions of the act of 1867, and agree that you will extend mains for the distribution of gas whenever the public and private lights immediately arising from such extension will pay seven per cent. profit cost thereof, and, also, furnish gas to the city at actual cost, such cost, however, not to exceed a fixed and specified amount to the
340 city, no matter what the cost might actually be to the company, and also agree that your charges for gas to private consumers shall be so graded as not to exceed twelve per cent. per annum on the par value of the stock and lay out in extensions, unconditionally, two per cent. of said profit, and not capitalize it except at the end of every five years, and also act as trustee of the stock in said company which the city owned, amounting to nearly one-half of the entire stock, then you shall have, during the term your charter has to run, the exclusive right to manufacture and vend coal-gas lights, and to supply the city and citizens of Louisville with gas, reserving, however, to every citizen the right
341 to erect gas-works on his own premises, and to supply himself with gas. And this agreement on the part of the Legislature was embodied in the declaration set out in the sixth section:

"That no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the city council and the directors of the Gas Company."

The court sees that in this amended act are all the elements of a valid contract. Here was a surrender of some rights by one party for the benefit of the public, and grants, municipal covenants and agreements, based upon a valuable consideration. Here were matters of disagreement between the Gas Company and the gen-
342 eral council of Louisville adjusted by the legislative interference and help; some advantages relinquished; additional and more onerous obligations assumed; rates and charges for services and prices of gas fixed and settled; surplus profits appropriated in the interest of the local community, and an equivalent given for such surrenders, relinquishments, and additional obligations assumed by the Gas Company in the exclusive privileges and immunity from legislation contained in the fifth and sixth sections of said act of the 2nd of January, 1869.

In view of this undisputed and indisputable history of the origin

of the amendment, and of the language thereof, can it be believed that it was intended by either the Legislature or the Gas Com-
343 pany that the latter should be bound to say amendatory act forever, and the former for not a single day?

That the sixth section was only introduced "to regulate the respective rights of the city and the Gas Company, so that neither, without the consent of the other, could call upon the Legislature to exercise its right of alteration or repeal." That it was intended to be a part of the contract that the State of Kentucky was at her option to be bound or not, whilst the Gas Company remained chained to it. That notwithstanding the sixth section of the act, imperatively declaring that no alteration, etc., should be made, except upon the condition expressed, the Legislature might still, at its op-
344 tion, alter, amend, or repeal the entire charter of the Gas Company.

Such a contract as that, exacted under the circumstances, set forth and expressed in the language used in the sixth section of the act, would amount to bad faith on the part of the Legislature. Justice to the State forbids such a construction of the act of 1869.

Then we think we must all assent that the natural and popular and intended meaning of the language of the sixth section of the act is that the charter of the Gas Company should remain unaltered and unchanged until the council and company should ask for legis-tion, and thereby untie the hand of the Legislature.

If this be not the true meaning and intent of the Legisla-
345 ture, then we are prepared to say that no words will or can restrain that body from undoing its most solemn acts, and going back upon it- most solemn legislative contracts and agreements.

If the construction given by the court to the sixth section of the act of 1869 be the correct one, then it would seem to follow that the Legislature, by said section, came under and implied obligation to amend or alter the charter when concurrently requested to do so by the Gas Company and general council of Louisville. We have argued that the Legislature could legislate or not, as it might choose, independently of that section and without it; also had the undoubted right to alter, amend, or repeal the entire charter. Can it be
346 that the section was incorporated just to assert a power which independently and antecedently thereof it unquestionably possessed?

If the act implied an obligation on the part of the Legislature to alter or amend the charter upon the concurrent request of the company and council, the logical sequence of such premises is that there was an implied agreement on its part not to alter or amend without such concurrent request. If the court says that we have misconceived its meaning, and that it was only intended to say that in the opinion of the court the Legislature only intended to declare by said act that it would not give ear to any amendment of the charter that was not asked for by both the company and council, and did not intend by any means to divest itself of its
347 power to repeal the charter or amend it, or of its discretion

to grant to refuse any legislation that might be asked for by the parties interested, then again we say that, independently of said section, it was in possession, undoubtedly, of such power, right, and discretion. And, if such was the case, we again ask, with the utmost respect and deference to the court, why did the Legislature do so useless a thing as to enact the sixth section of the act of 1869? Is it not clear that the court has misconceived the meaning and purpose of that section of said act, and denied to it the force and effect sought to be accomplished through its provisions by the Gas Company, the general council of the city of Louisville, and Legislature of the State of Kentucky?

348 VII.

We respectfully contend that the Louisville Gas Company is not such a monopoly as was void at the common law. One of the elements at common law, necessary to bring a grant within the category of a monopoly, was the fact that it was not based upon any consideration either of a public or private nature; and another which may be mentioned is that the grant was either unlimited in time, or, if limited, the time was unreasonable. Neither of these objections can be urged against the charter of the Gas Company, for the privilege it enjoys is based upon the valuable considerations of public and private services, the surrender of valuable advan-
349 tages, and assumption of onerous duties and obligations, as we have already shown; and the exercise of said privilege is limited within a term which is considered reasonable by Judges Prior and Lewis, and again it cannot be called, and is not, a monopoly at common law, because it has accepted the office of trustee for the municipal government of Louisville, and further, because its charter does not restrict the right of any citizen to make gas for himself; therefore the company has not an exclusive right to make gas, nor has it the right to prevent others from making and using it. Under the charter every citizen is actually independent of the Gas Company. Even under the doctrine of the Norwich Gas case the
350 charter of the Gas Company does not create a monopoly.

Allusion is made in the opinion rendered by the chief justice and Judge Hines to the length of time appellee claimes the benefit of the exclusive privilege of making and vending gas.

It is said, "that, outside of the constitutional question, the exclusive right asserted by appellee should not be recognized. If, as insisted by council *by* appellee, the act of 1867 is (not?) the grant of a new charter to the old corporation created in 1838—that corporation has the exclusive right for fifty years to manufacture and supply gas to the city and citizens of Louisville."

This court has decided that the charter of 1867 was the grant of a new charter to the Gas Company, and not an extension of
351 the old charter. (Commonwealth *vs.* Craig, 14 Bush., 525.) The first or old charter had a life of thirty years; the last or new one extends for twenty years. Whatever the court may think about the reasonableness or unreasonableness of the period of life of the old charter, one-half of its members do not consider the life

given the new one unreasonable. The grants of charters and the terms for which they may exist are matters peculiarly within legislative jurisdiction. The courts have nothing to do with the policy of legislative action, and hence we beg leave to differ with the doctrine declared in the quotation we have made from the opinion specified. The fact that the Legislature incorporated a company in 1838 for thirty years, which, by amendments to the charter,
352 came to be called the "Louisville Gas Company," with an exclusive privilege of making and selling coal-gas, should not affect the right of a new company called by the same name, chartered in 1867 and 1869, to take the place of the first and render to the public and to private citizens the services it had rendered, also enjoying a like exclusive privilege to judicial recognition and to all the protection guaranteed the citizens by the Constitution and the laws. No such circumstances as these should or can be admitted to affect the very important questions before the court and involved in this case.

We respectfully petition the court to grant the appellee a rehearing, and, upon such consideration, to affirm the judgment of
353 the Louisville chancery court.

GOODLOE & ROBERTS,
ISAAC CALDWELL,
THEO. L. BURNETT,
ALEX. P. HUMPHREY,
Counsel for Appellee.

Authorities.

Acts of 1867.
Act of 1869.
Dartmouth College Case, 4 Wheat., 518.
New Jersey *vs.* Yard, 95 U. S. R., 113.
Stone *vs.* Wisconsin, 94 U. S. R., 185.
Hamilton *vs.* Keith, 5 Bush, 461.
Gorden *vs.* Winchester, 12 Bush, 110.
Smith *vs.* Warden, MS. Opinion.
Constitution of Kentucky, art. 13, sect. 20.
" " " " "
" " ", U. S., Art. 1, par. 1, sect. 10.
Commonwealth *vs.* Whipps.
Smith *vs.* Brannin, 79 Ky., 119.
Patterson *vs.* Trabue, 3 J. J. M., 598.
O'Hara *vs.* Lex. & O. R. R. Co., 1 Dana, 230.
Shephard *vs.* Milwaukee Gas Co., 6 Wis., 546.
354 Com's Sinking Fund Co. *vs.* Green & Barren Riv. Nav. Co., 79 Ky., 78.
Gas Light Co. *vs.* Colliday, 25 Md., 1.
People *vs.* Manhattan Gas. Co., 45 Barbour, 136.
Norwich Gas Light Co. Case, 25 Conn., 19.
Act of February 14, 1856, sect. 8.
Duvall, vol. 2, 175.
Com'lth *vs.* Kane, 14 Bush, 525.

Act of 1838. Gas. Co. charter.
Granger Cases. Munn *vs.* Ill. & others, 94 U. S. R.

The reply to the petition for rehearing referred to in the foregoing order is in the words and figures following, to wit:

Reply to the Petition for Rehearing.

Court of Appeals of Kentucky.

CITIZENS' GAS LIGHT CO., Plaintiff,

vs.

LOUISVILLE GAS CO., Defendant.

The petition for a rehearing herein goes over the same
355 grounds covered by prior arguments and answered by the opinion. We will not, therefore, follow the council for appellee, but refer the court to our former briefs filed in this case. One additional idea, however, which seems to us fatal to the claim of the Louisville Gas Company to a monopoly, may perhaps be elaborated by us at this time to advantage.

The grant of exclusive privilege to the Louisville Gas Co. to make and sell coal-gas in the city of Louisville was granted by the act of January 30th, 1869.

It was granted by the Legislature under the exercise of that power of government known as the "police power." It is only under the police power of the State that such a grant of exclusive privilege can be made at all. (16 Wallace, 62.)

356 In the famous "Slaughter-House cases," decided by the Supreme Court of the United States, in 16th Wallace, page 37, when the Legislature of Louisiana granted to the Crescent Slaughter-House Company the exclusive privilege of slaughtering cattle for sale in the city of New Orleans, the exclusive privilege was sustained as valid simply and only on the ground that it was "an exercise of the police power of the State." (See the opinion of the Court, 16 Wallace, page 62.) The supreme court of Louisiana also sustained the validity of the exclusive privilege, on the express ground that it was an exercise by the State of the "police power." (State *vs.* Fagin & Co., 2nd Louisiana Annual Reports, page 546.)

Such grants of exclusive privilege and regulations of who
357 may make and sell gas are shown to be strictly exercises of the police power of the State in Cooley on Constitution- Limitations, 5th edition, pages 728–45 inclusive, where the whole subject of "police power" is elaborately treated.

In Dillon on Municipal Corporations, 3rd edition, section 141, (being section 93) of the second edition, it is shown that the "police power" is the power under which all such regulations can alone be exercised. (16 Wallace, 87.)

No grant of an exclusive privilege can be found in this country where the grant was held to be valid, unless where the grant was held to be made in the exercise of the "police power" of the State.

If the grant is not one which is appropriate to the police
358 powers of the State, then the grant is void. (See Judge Field's opinion, Slaughter-House Cases, 16 Wallace, 87, 88, & 89.)

Now, it is a principle well settled in American jurisprudence that any grant made under the exercise of the "police power" is subject to be repealed at any time. (Cooley's Const. Lim., side page, 276, 277.)

The police power being one of the powers of government, one Legislature cannot bargain away any portion of that power, otherwise the government would be greatly enfeebled, and ultimately destroyed.

A better illustration of this cannot be given than in tracing the history of the celebrated "Slaughter-House cases" in New Orleans.

In the year 1869 the Legislature of Louisiana incorporated
359 the Crescent Slaughter-House Company, and in the charter it gave to that company "the exclusive privilege," for the period of twenty-five years, of slaughtering cattle for the markets in the city of New Orleans. The monopoly thus obtained was resisted by the other butchers of New Orleans; but the court of appeals of Louisiana sustained the validity of the exclusive privileges, on the ground that its grant was in the exercise of "the police powers of the State." An appeal was taken from this decission to the Supreme Court of the United States, and in the famous "Slaughter-House cases," 16 Wallace, page 36, the judgment of the supreme court was affirmed, upon the express ground that the grant of the exclusive privilege was valid, because it was an exercise of the "police power"
360 of the State. (16 Wallace, 62.)

In 1879 this exclusive privilege in the charter of the Crescent Slaughter-House Co. was "repealed" by the Legislature of Louisiana. The said company claimed that the said repealing act was void as an "impairment of the obligation of their contract" with the State. And that the exclusive privilege in their charter was a "contract with the State," which could not be repealed by any subsequent Legislature. The court of appeals of Louisiana in a carefully prepared opinion held that the repealing act was valid, and that the exclusive privilege had thereupon ceased to exist. The court held—

1. That the grant of the exclusive privilege was an exercise of the "police power."

361 2. That the police power of the State can never be contracted away.

3. "That such an act of the Legislature cannot bind the State, the rights therein granted revocable at the will of the sovereign, and the grantee holds nothing indeed but a license subject to abrogation by future constitutional or even legislative action."

4. "Such a charter does not create a contract between the State and grantee, protected from impairment by the Constitution of the United States."

In its opinion the court cited and quoted from the cases of State *vs.* Mississippi, 101 U. S., 814; Beer Co. *vs.* Massachusetts, 97 U. S., 25, as establishing the rule that the Legislature "cannot bargain

away the police power of the State," and that all grants of
362 exclusive privileges being exercises of the police power are "subject to be repealed" by any subsequent Legislature.

The principle upon which this is based is that the grant of the exclusive privilege to make gas, for example, in Louisville, was deemed by the Legislature, in 1869, as a privilege which the public good, at that time, required to be given to one party alone; but as times changed, and as public necessities changed, or were believed by the Legislatures to have changed, subsequent Legislatures adopted different views, and considered that it is best for the public good that gas should be made and sold by other companies also; and the subsequent Legislature has as much right to exercise the
363 police power of saying who shall make and sell gas in Louisville as the Legislature had in 1869, when it said that the Louisville Gas Co. alone should do so.

The litigation with regard to the Louisiana slaughter-house monopoly is so completely in point as to this case that it ought to settle this controversy itself.

There, as here, the Legislature first granted exclusive right to one company. There, as here, a subsequent Legislature thought that that exclusive right had run long enough. There, as here, the subsequent Legislature repealed the exclusive right, and, while the exclusive right was held to have been originally valid, yet it was held that the police power, under which it was originally granted,
364 could be exercised in *appealing* it with equal validity. And it was held that such grants "are not contracts" in the meaning of the constitutional provision against the impairment of contracts.

And this is in accordance with all the modern authorities on this subject. Thus in Cooley on Constitutional Limitations, 5th edition, pages 339–44, (side page 282–283), it is shown that no one legislature has the power to make a contract, by which any grant under the police power can be made perpetual, or irrepealable.

In New Jersey *vs.* Yard, 5th Otto 104, the Supreme Court said, that while it is true that a charter or legislative enactment
365 might contain a contract, yet a charter was not itself a contract, and the question was always to examine into the charter and see whether there was in fact, a contract, or merely an exercise of the police power or other legislation.

In Beer Co. *vs.* Massachusetts, 7th Otto, 33, it was held that the Legislature cannot, by any contract, divest itself of the right to change, from time to time, any police regulation that it chose to make. Then the privilege given to a corporation to manufacture beer was repealed, and the repeal was held to be valid and not a violation of any contract.

In Stone *vs.* Mississippi, 11th Otto, 819, where the Legislature of Mississippi first granted a privilege, which was in effect an exclusive one, to one Stone, to operate a lottery in Mississippi, and a
366 subsequent Legislature repealed the grant, the Supreme Court held that the repealing act was valid, and not a violation of any contract right, saying:

"The supervision of both these subjects of governmental power is containing in its nature, and they are to be dealt with as the exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.

"For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

The Court then distinguish from the Dartmouth College case, and say:

367 "But the power of governing is a trust committed by the people to the government, no part of which can be granted away. They may create corporations and give them, so to speak, a limited citizenship, but, as citizens limited in their privileges, or otherwise, these creatures of the government's creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those which relate to property rights, not governmental.

"In short, the principle is, that the grant of an exclusive privilege is void at common law." (Slaughter-House Cases, 16 Wallace, page 65.) (Case of the Monopolies, Coke's Reports, Vol. II, page 85.)

368 An exclusive privilege can be created only by a grant from the Legislature, and the Legislature can only make such a grant in reference to those masters which are the legitimate subject of the exercise of the police powers. (Slaughter-House Cases, 16 Wallace, 65–6; 33 Louisiana Annual Reports, 934.)

If the subject-matter of the grant of the exclusive privilege is not one which comes legitimately within the exercise of the police powers, the grant is void. If the grant is valid, it is because it is an exercise of the police powers. And if it is an exercise of the police power, then it is not a contract, but the exercise of a governmental function, and it is always subject to be repealed or otherwise

369 changed by subsequent exercise of the same police powers. (See especially Fertilizing Co. *vs.* Hyde, 7 Otto, 669.)

This is the result of the decision in regard to the New Orleans slaughter-house monopoly in 33rd Louisiana Annual, 934, and of the decisions of the Supreme Court of the United States in the cases cited by the Louisiana court in their opinion. It follows that the grant of exclusive privilege to the Louisville Gas Company in 1869 was not a contract, and therefore was not protected by the Constitution of the United States against impairment. And it follows that even without the provisions of the act of 1856, by which the right to repeal all charters is retained to the State, the right to

370 repeal this exclusive privilege would exist in the Legislature of Kentucky in the exercise of the same police power, by which the exclusive privilege was originally granted.

In this case the extended discussion in the petition for a rehearing of the question as to whether or not the act of 1869 plainly expressed the intention of the Legislature not to repeal that exclusive

privilege becomes immaterial, for without any such special reserved right to repeal the charter, that right was reserved by the fact that the repeal is the exercise of the police power of the government, which could not be granted away by the Legislature.

II.

371 It is doubtful if it is a legitimate exercise of the police power to give a monopoly to one person of the right to sell gas.

The following cases would seem to show that selling gas is not one of those things to which the governmental power of police extends:

Norwich *vs.* Norwich Gas Co., 25 Conn., 19.
McCune *vs.* Norwich Gas Co., 30 Conn., 521.
Patterson Gas Co. *vs.* Brady, 3 Dutcher (N. J.), 245.
Oakland *vs.* Carpenter, 13th California, 546.
Gale *vs.* Kalamazoo, 23rd Michigan, 353,
Rumpf *vs.* Chicago, 45th Illinois, 90.

The principle settled in those cases is that the Legislature has no more right to give one man the monopoly to sell gas than it has to give to another man the monopoly to sell wheat, and to another of selling bread, and to another of shoes, or hats, or buttons, or clothes.

372 The governmental function of the police power does not reach these things.

For this reason we think the reasoning of your honors is sound, when you say, near the close of the opinion, that "there is no constitutional or common law reason why the citizens of Louisville should be restrained of their right to purchase that commodity (gas) where it can be most cheaply obtained, as that right unquestionably exists in all other branches of trade and commerce."

III.

On the point of the petition for a rehearing, that the act of 1869 binds the Legislature not to repeal the exclusive privilege, we think it is fully answered by the sentence from the opinion of your honors:

373 "This section was clearly not intended to be a limitation upon the Legislative power of appeal, but was intended to regulate the respective rights of the city, and the Gas Company so that neither, without the consent of the other, could call upon the Legislature to exercise its right of alteration or repeal."

If the preamble to that act of 1869 is read, this will [be] manifest. For that preamble recites, that "the city of Louisville and stockholders of the old Louisville Gas Company have agreed to certain amendments and desire that they may become a part of said amended charter."

374 It is evident that the city and Gas Company wanted to have "of record" their agreement that neither of them would cause any alteration or amendment of the charter of the Gas Company "without the concurrence of the city council and the directors of the Gas Co."

Certainly that does not "plainly express" an intent on the part of the Legislature that its right to exercise the police power of repealing that monopoly clause should not be exercised when it deemed the public good required. Besides that, preamble of January 30th, 1869, recites that the amended charter of 1867 had already — accepted, and there was no consideration for the State for any irrevocable contract of a monopoly.

Christ Church *vs.* County of Philadelphia, 24th Howard, 300.

And again, as we have seen, whatever may be the rule as
375 to "charter" proper, the monopoly clause was an exercise of the police power, and the right to repeal it would not be contracted away.

Order—Note Filing Additional Pet'n for Rehearing.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky at the capitol, in the city of Frankfort, on the 15th day of September, 1883, "came appellee, by counsel, and filed an additional petition for rehearing."

376 The additional petition for a rehearing, referred to in the foregoing order, is in the words and figures following, to wit:

Supplemental Petition for Rehearing.

CITIZENS' GAS LIGHT CO., Appellant,
vs.
LOUISVILLE GAS COMPANY, Appellee.

The appellee, The Louisville Gas Company, asks leave to file this supplemental petition for the purpose of calling the court's attention to a case known as the Tobacco Warehousemen's case.

The style of the case is Nash *vs.* Page, &c., 80th Kentucky Reports, page 539. This case is quoted upon the point for which we have earnestly contended—that the services rendered by the Louisville Gas Company in lighting the streets of the city of Louisville, the city council chamber, public schools, public offices, and the churches, theaters, &c., &c., were public services in the meaning of the constitution of Kentucky, justifying the grant of the exclusive privilege contained in the charter of the appellee.

377 We also refer the court to the case of New Jersey *vs.* Ford, 5th Otto. The case is quoted in support of the point in which we have contended that the Legislature intended by the amendment of 1869 to the Louisville Gas Company's charter that the entire charter should not be repealed, altered, or amended unless both the general council of the city of Louisville and the directors of the Louisville Gas Company should consent thereto, and that, therefore, the right of the appellee to exclusive privilege had not been affected by the charter granted the appellant.

Respectfully submitted.

GOODLOE & ROBERTS,
For Appellee.

378 *Order Overruling Petition to Rehearing.*

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capitol in the city of Frankfort, on the 22d day of September, 1883, "the court being sufficiently advised, it is considered that the petition for rehearing herein be overruled." The court delivered a response to said petition.

The response referred to in the foregoing order is in words and figures following, to wit:

Court's Response to Pet'n for Rehearing.

State of Kentucky Court of Appeals. 1883, September 22nd.

CITIZENS' GAS LIGHT CO. *vs.* LOUISVILLE GAS LIGHT CO.

379 The court, being sufficiently advised, rendered the following opinion:

After a careful consideration of the questions upon which the affirmance in this case must rest, I am satisfied it was not the legislative purpose to surrender all power over the enactment in question. Matters of disagreement were likely to arise between the company and the council with reference to the obligations allowed by the company, and for that reason the Legislature, in order to prevent the one from obtaining legislation unfavorable to the other, provided that no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the city council
380 and the directors of the Gas Company. The council might apply to have the price of gas reduced without notice to the company, or to have other legislation ruinous to its interests, therefore both must be consulted when the one or the other should apply for an amendment.

It was not intended that the action of the two corporations should constitute the legislative will; and if the act of 1856 was to be ignored, it would have been an easy task for the Legislature to have said that the act of 1856 should not apply to the new charter. This court is asked to say that the sixth section of the new charter repeals, by implication, the act of 1856, when it is evident, we think, that such a construction never entered the legislative mind. The
381 power of the Legislature over the charter was never surrendered, and the only purpose of the sixth section was to prevent legislation in behalf of the one corporation without the knowledge of the other.

If the company, by its charter, sought to accomplish such a purpose, it should not have left any room for construction in a matter affecting such vital interests.

We are asked to surrender all legislative contract over the subject upon a doubtful construction of the statute.

This ought not to be done.

I, Thomas J. Henry, clerk of the court of appeals of the Commonwealth of Kentucky, do certify that the foregoing and annexed three

hundred and seventy-one pages contain a true and complete
382 transcript of the cause therein set forth of The Citizens' Gas Light Company, appellants, against The Louisville Gas Company, as is on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office at the capitol, in the city of Frankfort, this 30th day of November, 1883.

[SEAL.] THOMAS J. HENRY, C. C. A.
By THOMAS G. POORE, *D. C.*

Endorsed on cover: Kentucky court of appeals. No. 869. The Louisville Gas Company, plaintiff in error, vs. The Citizens' Gas Light Company. Filed 16th January, 1884.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 809.

THE LOUISVILLE GAS COMPANY, Plaintiff in Error,

VERSUS

The Citizens Gas-light Company, of Louisville, - - - Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Brief for Plaintiff in Error.

JNO. K. GOODLOE,
of Counsel, for Plaintiff in Error.

GOODLOE & ROBERTS,
HARGIS & EASTIN,
ALEX. P. HUMPHREY,
J. G. CARLISLE.
Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

Supreme Court of the United States.

LOUISVILLE GAS COMPANY, - - *Plaintiff in Error,*

VERSUS

THE CITIZENS GAS LIGHT COMPANY, OF LOUISVILLE, - - - - - - - - - - *Defendant.*

Argument for Plaintiff.

STATEMENT.

This case presents a contest between the two corporations of the State of Kentucky above named.

By an act of the legislature of said State, passed in February, 1838, there was created a corporation by the name of the "Louisville Gas and Water Company," to continue for thirty years from the 1st of January, 1839; but the authority to erect water-works was taken away in 1842. It was made its duty within a certain specified time after its organization to establish in the city of Louisville a gas-works and manufactory of gas of sufficient capacity to supply the city and the citizens of Louisville with such public and private lights as might be required.

In order to enable said corporation to establish its gas-works in said city, it was authorized to lay down pipes and conductors through any of its streets and alleys, to take up and replace the pavements, being responsible for any damage it might cause, and subject to the regulations of the city as to the streets and alleys, etc.

Said charter conferred on said corporation the exclusive privilege of erecting and constructing gas-works in said city, and of vending gas-lights to the city and citizens of Louisville. By said original act the city of Louisville was given the privilege of buying the gas-works, at the termination of the charter, at a fair estimate of the value of the works.

Under the provisions of said charter the company was promptly and legally organized, stock was sold, and among the subscribers for the stock of said corporation was the city of Louisville for a large number of shares. The corporation at once proceeded to erect and establish a gas-works, supplied itself with all necessary apparatus for the manufacture and purification of gas, laid mains and pipes to conduct gas through the streets and alleys of said city, erected lamp-posts and lamps for lighting the streets, commenced and successfully carried on the manufacture of gas, supplied service-pipes and meters, and furnished gas to all citizens who desired it; and to all of the public buildings of the city, and to all public places for which application was made, and so continued to do throughout the entire term of its corporate life; and prior to the 1st of January, 1869, said corporation had laid down in the streets of Louisville many miles of pipes and conductors, had put in several thousand service-pipes, furnished several thousand meters to the citizens and city, and had established and owned a plant for furnishing gas to the city and citizens of Louisville equal to any demand made upon it.

Under certain arrangements between the company and the city, the dividends upon the city's stock were to be applied to the following objects, in the order named, viz., to pay the interest on $100,000 of bonds, to purchase for the city another two thousand shares of stock, to pay the principal of the bonds, and to accumulate a trust fund to aid the city in purchasing the works. This last object finds its explanation in the eighteenth section of the original charter which gives to the city the option of purchasing the works at an appraisement when the charter should expire. Thus it came about that when, in 1869, the city having declined to purchase, the property of the Louisville Gas Company was recapitalized, the city found its bonds, principal and interest, paid by its dividends, stock to the amount of 8,307 shares, or at par, $415,390 standing in its name, and a trust fund of $158,-

849.76 standing to its credit on the books of the company. For this the city had never really paid one dollar.

In anticipation of the action of the general council upon the subject of purchasing said gas-works, and of the termination of its charter, said corporation applied to the legislature of the State for an extension of corporate life and powers. That body granted it a new or extended charter, the title of which is as follows, "An Act to Extend the Charter of the Louisville Gas Company."

It was approved January 30, 1867. Its preamble is as follows:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky*, that the following charter be granted to the present Louisville Gas Company, to take effect at the expiration of the present charter, on the 1st day of January, 1869, provided the city of Louisville does not exercise its privilege to purchase the same in accordance with the terms set forth in article 18 of the present charter."

We deem the following sections of said act necessary to the discussion of this case, and quote them at length:

SEC. 1. That a company shall be and the same is hereby incorporated, with a capital of fifteen hundred thousand dollars, to be divided into shares of fifty dollars each, to be owned by individuals, companies, and corporations; they and their successors and assigns shall be and they are hereby created a body politic and corporate, by the name and style of the "Louisville Gas Company," and shall so continue for twenty years from the 1st day of January, 1869, and by that name and style, under the restrictions hereafter prescribed, shall be capable to contract and be contracted with, sue and be sued, plead, answer, and defend, in all courts and elsewhere, as natural persons, and may have and use a common seal, and change, alter, and renew the same at pleasure; and may ordain and put in execution such by-laws, rules, and regulations for the good government of said company, and for the efficient management of its affairs and prudential concerns, as may be deemed expedient, not contrary to the constitution or laws of this State or of the United States.

SEC. 2. That the capital of fifteen hundred thousand dollars shall consist, first, of the stock of the present Louisville

Gas Company on the 31st of December, 1868, at par value; secondly, of the contingent fund and individual profits that the same company may own at the expiration of its present charter, said fund to be capitalized pro rata for the benefit of the present stockholders, except fractional parts of shares which shall be paid in cash; and thirdly, new stock may be issued and sold by the new company, when required, to the extent of the capital stock; the sales to be made at public auction, after ten days' notice in the city papers. Should such stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale of said stock.

SEC. 3. That said company shall keep an office in the city of Louisville, and its business shall be to make and furnish gas to the city of Louisville and the residents thereof, and vend the same; and said company shall have the right to purchase and hold such real and personal property as may be necessary, proper, or convenient in the carrying on and transacting its said business.

SEC. 4. The Gas Company shall, within two years after this charter takes effect, be required to extend the gas distribution to Portland, and lay down street mains along the Portland Avenue to the intersection of Third and Fulton streets, Portland; thence along Third Street to Commercial Street; thence north on Commercial Street to Water Street; thence down Water Street to Grove Street, including the erection of public lights.

SEC. 5. The company may extend the main pipes for distributing the gas when, in their judgment, it may seem fit; but shall not be bound to extend the same until the private and public lights required by the citizens will pay eight per cent profit on the cost of the extension; and whenever an extension is required, the company shall furnish the proper estimates; and when the sum required shall be subscribed, the company shall be bound to make the extension until their capital stock is absorbed in the gas-works and extensions.

SEC. 6. That, to enable the company to construct, continue, and extend its gas-works in the city of Louisville, it is authorized to continue the use of the pipes and conductors which may have been laid down; and, with the consent of the city council, to own and extend its pipes and conductors through the other streets and alleys of said city; and for that purpose to take up the pavements and to replace the same; and shall be responsible to the city for any dam-

age which may arise therefrom, or any unreasonable delay in replacing the same; and said company shall be subject to the regulations of the city as to the streets and alleys, and to the same ordinances and penalties that individuals may be subject to: *Provided*, All extension of pipes and conductors shall be made with the consent of the general council of the city.

SEC. 7. The Gas Company shall put lamp-posts, fixtures, etc., along the street mains as they are extended, at a distance apart of about two hundred feet, or as near that distance as the dimensions of the square may admit, so as to make an equal distribution of the same; and whenever there are street mains on both sides of the streets, the lights are to be located so as to alternate, preserving the same distance, namely, about two hundred feet for the lamps on each side of the street. The Gas Company are to keep the lamps in order, to furnish gas, and light and extinguish the same, giving to each light an illuminating power of about twelve sperm candles; and the time of burning shall be from the close of twilight at evening until dawn of day in the morning, except on clear, moonlight nights, or parts of nights, when the moon shines clear and bright, when the lights may be dispensed with; and shall charge and receive therefor from the city of Louisville only the actual cost thereof. These charges shall not exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, nor shall the price charged other consumers of gas be greater than the average price of gas charged such consumers in said cities.

SEC. 10. The stockholders, exclusive of the city of Louisville, may elect five (5) directors, and the general council of Louisville, four(4) other directors, and these nine directors shall choose from among themselves a president; and to said directors shall be intrusted the real and personal estate, business, property, funds, and financial concerns of said company, and the administration of its affairs. All the directors shall be stockholders to the amount of twenty shares each, in their own right, and, after their first election shall have been stockholders not less than three months before the election at which they are chosen. They shall serve for one year, and until their successors are chosen; and after the first election there shall be an annual election on the first Monday of January in each year, of which notice shall be given for ten days in the newspapers printed in Louisville; and the city council shall, at their first regular meeting after the first Monday in January, elect the four directors on the

part of the city. The president and directors shall fill all vacancies that may arise in their body from death, resignation, removal from the city, or the failure to meet their engagements to the company with promptness; and it shall be the duty of the other directors to declare the seat of a director vacant for that cause, or for a removal from the city. This, however, excepts those vacancies occurring among the directors appointed by the city, which vacancies are to be filled by the general council of the city. That each share of stock in this company shall entitle the owner to one vote; and no one individual, company, or corporation, other than the city of Louisville, shall hold more than two thousand shares of the stock, either directly or indirectly; and if any one shall purchase and hold more, except the city, he shall forfeit his dividends on such excess of stock to the Gas Company.

SEC. 18. The city of Louisville, if it so elect, may purchase the gas-works at the termination of this charter, at a fair estimation of what said works are worth at the time: *Provided*, That the city shall notify the company of said election on her part at least one year before the termination of this charter; the value of the works to be ascertained by two competent gas engineers selected, one by each of the parties, and, in case of their disagreeing, by an umpire, whom they may select; the proceeds of which sale is to be divided pro rata among the stockholders, including the city of Louisville.

SEC. 19. This charter is to be valid and in full force when accepted by those who hold the majority of the shares of stock in the present Gas Company; and the new company shall become successors to and owners of all real estate and other property belonging to old company.

A short time prior to the expiration of the charter of said company (the city being a large stockholder and creditor of the company), the subject of purchasing its gas-works and property was brought before the general council of the city of Louisville, and referred to a committee for consideration and report. The committee reported in writing against the purchase with a resolution to that effect, which was adopted by the council and approved by the mayor in a message in which he recommended that body to consult with the Gas Company touching the rate charged for gas furnished

consumers, *with a view of arriving at a satisfactory conclusion of the matter.*

See the report and resolution on page 32 of the printed record marked "Exhibit A," and see the mayor's message on page 33, printed record.

In accordance with the mayor's suggestion a conference was asked and granted, and took place between the board of directors of the Gas Company and the general council of the city of Louisville through a committee of each body, which resulted in an agreement that the city and company should jointly apply to the legislature of the State to amend said act of January 30, 1867. The amendment to be asked for was agreed upon and adopted by the council of the city and the board of directors of the company and put into writing.

The amendments were presented to the legislature with a resolution of the general council of the city, requesting the senators and representatives of the city to have the charter of the company of January 30, 1867, so amended as to incorporate therein the said provisions agreed on. These amendments were then drawn up in the shape of a bill, presented to and passed by the legislature and duly approved by the governor.

The action of said general council and message of the mayor in reference to the consideration and acceptance of the amendments to the charter of the Gas Company are to be found on pages 33, 34, 35, and 36 of the printed record.

The said bill containing said amendments was approved by the governor on the twenty-second day of January, 1869, and is as follows:

CHAPTER 1282.—An act to amend an act entitled "An Act to Extend the Charter of the Louisville Gas Company," approved January 30, 1867.

Whereas, The city of Louisville and stockholders of the old Louisville Gas Company have accepted the said extended charter, and have agreed to certain amendments thereof, and desire that they may become a part of said extended charter:

Be it enacted by the General Assembly of the Commonwealth of Kentucky: SEC. 1. That any person who may be entitled to a fractional share of stock under the provisions of section second (2d) of said extended charter, may have his or her election either to take the same in cash at par, or have issued a whole share by paying the difference of par value of the fractional share and a whole one.

SEC. 2. That the Gas Company shall be bound to extend its main pipes whenever the public and private lights immediately arising from said extension will pay seven (7) per cent profit on the cost thereof; and so much of the fifth (5) section of said extended charter as requires a profit of eight (8) per cent on the cost of an extension is hereby repealed.

SEC. 3. That the Gas Company shall put lamp-posts, fixtures, etc., along the street mains as they are extended, at a distance apart of about two hundred feet, or as near that distance as the dimensions of the squares may admit, so as to make an equal distribution of the same; and whenever there are street mains on both sides of the streets, the lights are to be located so as to alternate, preserving the same distance, namely, about two hundred feet for the lamps on each side of the street. The Gas Company are to keep the lamps in order, to furnish gas, and light and extinguish the same, giving to each light an illuminating power of about twelve sperm candles; and the time of burning shall be from the close of twilight at evening until dawn of day in the morning, except in clear, moonlight nights, when the light may be dispensed with; and said public lights shall be furnished to the city at actual cost; but in no event to exceed thirty-five dollars ($35.00) per lamp; and the charge for gas to private consumers shall be so graded as that the company's profits shall not exceed twelve per cent per annum on the par value of the stock, ten (10) per cent of which may be drawn by the stockholders in semi-annual dividends, and the other two per cent to be laid out for extensions, and not to be capitalized except at the end of every five years. Section seven (7) of said extended charter is hereby repealed.

SEC. 4. That the stock and other interest the city has, or may have, in the gas-works, shall not be disposed of, but the dividends arising therefrom shall, as far as necessary, be applied to paying for the public lights of the city; and all investments of unused dividends belonging to the city shall be made by the directors of the Gas Company as trustee, with the concurrence and advice of the city council, and held as a permanent trust during the continuation of this charter.

SEC. 5. That said Gas Company shall have the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuation of this charter, and of vending coal gas lights, and supplying the city and citizens with gas by means of public works: *Provided*, however, this shall not interfere with the right of any one to erect, or cause to be erected, gas-works on their own premises, for supplying themselves with light.

SEC. 6. That no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the city council, and the directors of the Gas Company.

SEC. 7. This act shall take effect from its passage.

Approved January 22, 1869.

The said amendment of January 22, 1869, was agreed to by the Gas Company and General Council of Louisville, before the extended or new charter went into effect.

Both the acts of January 30, 1867, and January 22, 1869, were accepted by a majority of the stockholders of the company, as required in section 19 of said act of 1867. (See the preamble to the act of January 22, 1869.)

The new company complied with all the requirements of both acts in all respects.

The Louisville Gas Company enjoyed without interruption the rights conferred upon it by its said charter until 21st March, 1872, at which time an act incorporating the Citizens Gas Light Company of Louisville, defendant in error, was approved by the governor of the State.

The first section of said act is as follows:

SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky:* That Thomas C. Coleman, Walter N. Haldeman, James Barret, H. V. Newcomb, G. F. Fuller, E. D. Standiford, Isaac Caldwell, F. T. Fox, and J. P. Johnson, and their associates, successors, and assigns are hereby created a body corporate and politic, by the name of the "Citizens Gas Light Company of Louisville," for the purpose of lighting the buildings, public and private, in the city of Louisville, and adjoining territories, together with the streets, highways, lanes, alleys, parks, and other public places therein, and for other purposes; and by that name shall have perpetual succession, and are made capable in law

to take, purchase, possess, retain, have, hold, and enjoy to them, their successors and assigns, estates and interests of every kind, real, personal, and mixed, legal or equitable, and the same to manage, control, let, lease, assign, grant, bargain, sell, alien, convey, confirm, and dispose of, at pleasure, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended against in any competent court of law or equity, and before all tribunals to appear and protect its rights; to make, have, and use a common seal, and the same to break, alter, and renew at pleasure; and shall also have power to establish and put in execution such by-laws and regulations, not contrary to law, as they may deem necessary or convenient for the government of said corporation, and the management of their property and concerns, and the duties and employments of their officers and agents, and the same to change, alter, or amend, and generally to do all things necessary and proper to carry into effect the powers and privileges herein granted.

SEC. 3. Said company shall have power and authority with the consent of the general council of said city, to open the ground on any highway, street, lane, alley, park, or other public place within the limits aforesaid, and lay and repair therein their pipes for conducting gas; said company restoring the same to as good condition as before within a reasonable time thereafter; said company being required in so doing not to injure any gas or water-pipe, or connection, or sewer laid therein, and said corporation being liable to the city of Louisville for any damage it may have to pay for its negligence in so laying, repairing or restoring as aforesaid, and such power and authority is subject to such reasonable regulations as the mayor and city council may make for the protection of life, property, and health of citizens.

SEC. 4. The said company shall have authority to open ground to lay and repair pipes for conduction of gas to consumers in Portland and other towns adjoining said city of Louisville, in the highways, streets, lanes, alleys, and other public places thereof; subject to such reasonable regulations by the municipal authorities thereof respectively as they shall prescribe; said company laying, repairing, and restoring the same to like condition as before within a reasonable time.

The remaining sections of said act are not deemed necessary to the discussion of the case, and are not copied. The entire act is to be found on pages 13 to 17, inclusive, of the printed record.

On the eleventh of October, 1879, said Citizens Gas Light Company instituted in the Louisville Chancery Court against the plaintiff in error the action which is now pending in this court, under the title set out at the head of this statement.

The petition of said Citizens Gas Light Company will be found on pages 5 to 13, inclusive, of the printed record. It commences with a reference to the first charter granted to the Louisville Gas Company by the legislature, approved February 15, 1838, styled the Louisville Gas and Water Company, and then sets out the termination of its powers by lapse of time. It alleges that the Louisville Gas Company is asserting the exclusive privilege of manufacturing and vending gas in Louisville to said city and citizens thereof. The petition next mentions the creation of the said Louisville Gas Company by the said acts of January 30, 1867, and January 22, 1869, and after setting out the act of March 21, 1872, granting a charter to said Citizens Gas Light Company, the powers and rights thereof, it charges:

1. That the said acts of January 30, 1867, and January 22, 1869, granting said Louisville Gas Company corporate existence and powers for twenty years from January 1, 1869, were unconstitutional and void, because the subject of said legislation was not expressed in the titles of said acts.

This objection is based upon the thirty-seventh section of article 2 of the Constitution of Kentucky, which is as follows:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title."

2. That the fifth section of said act of January 22, 1869, conferring upon said company the exclusive privilege of erecting gas-works in the city of Louisville and of vending gas-lights to the city and citizens of Louisville for twenty years, was unconstitutional and violative of the first section of article 13 of the Constitution of Kentucky, which declares:

"That all freemen when they form a social compact are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services."

3. That the said acts of January 30, 1867, and January 22, 1869, were subject to amendment and repeal by virtue of the statute law of Kentucky in force at the time of the passage of said acts. The statute referred to in said objection is the first section of an act approved February 14, 1856, and reads as follows:

"All charters or grants of or to corporations or amendments thereof, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent shall be therein plainly expressed; provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." (Session Acts of 1856, Vol. 1, page 15. General Statutes of Ky., 616.)

4. That the grant of said exclusive privilege was an unreasonable monopoly and restraint upon trade and in derogation of public policy.

The petition concludes with the following prayer:

"Wherefore the plaintiff calls on the denfendants to set up their claims to exclusive privilege, if any they have; and upon final hearing it prays that this honorable court will adjudge that the plaintiff's said charter is invalid, and that it has the lawful rights and franchises to sell its said stock and to establish and operate a gas-works, to lay mains and pipes in the streets, alleys, highways, lanes, and other public places, and to make, supply, and sell gas in and throughout said localities of Louisville, Portland, and the territory adjacent thereto; and that the court will also adjudge that the defendant's said company has not, and that the defendants have not any exclusive privilege or franchise to establish or operate a gas-works, or to lay pipes, or to make or sell gas in said localities, and that the said pretended acts of January 30, 1867, and January, 22, 1869, are unconstitutional and void, and do not affect the plaintiff's rights under its said charter; and it prays that the defendants be perpetually

restrained and enjoined from setting up any claim to such exclusive privileges, or to any privileges, under said pretended acts or otherwise, and from in any manner impeding or preventing the plaintiffs from the full enjoyment of its said franchises, rights, and privileges, and from in any manner casting a cloud over the same. And the plaintiff prays judgment for its costs herein expended, and it prays for all general and proper relief."

The answer of the Louisville Gas Company sufficiently traverses all of the allegations of the petition assailing the validity of its charter and its rights to enjoy and exercise all of the franchises, powers, and privileges contained in said acts of 1867 and 1869, asserts its exclusive privilege to erect gas-works, make, and vend gas in Louisville, and sets up many facts which have been mentioned in the preceding pages of this statement. The answer also charges that said acts of 1867 and 1869, and the privilege and rights incorporated into the 5th and 6th sections of said act of 1869 constituted a contract between the said city, the Louisville Gas Company, and the State of Kentucky, which the State could not impair, alter, or amend, or repeal without the consent of both said city and Gas Company; and that the act of 21st March, 1872, incorporating the Citizens Gas Light Company, so far as it assumed to grant to said company any privilege or franchise to erect gas-works or vend gas-lights in said city, or any other privilege or franchise in derogation of said exclusive right, was null and void. (See page 28 of the printed record.)

In an amended answer, filed June 25, 1881, said company claimed a contract with the State and the city of Louisville for the exclusive right to establish gas-works in Louisville, and to make and vend gas-lights to said city and to citizens for twenty years from January 1, 1869; that said contract was under the protection of section ten of article one of the Constitution of the United States, and that so much of the act incorporating the Citizens Gas Light Company as empowered it to erect gas-works, make and sell gas-lights for

lighting buildings, streets, etc., in Louisville, including that part of the city called Portland, impaired the obligation of said contract and was void. (See pages 53 and 54 printed record.)

The only matters presented to the Louisville Chancery Court for its determination were issues of law, and after argument that court dismissed the petition of the citizens Gas Light Company. But upon the appeal to the Court of Appeals of Kentucky, the court reversed the judgment of the lower court.

The judges of the court were divided in opinion upon some of the issues.

1. Two of the judges were of opinion that the exclusive privilege granted the Louisville Gas Company by the 5th section of the act of 1869 was forbidden by the 1st section of article 13 of the Constitution of Kentucky, hereinbefore cited at length.

2. Also that said privilege was special legislation outside of the limit of legislative authority, and therefore void.

3. Also that such a grant was a monopoly, and therefore unconstitutional.

But Judges Pryor and Lewis maintained the validity and constitutionality of the grants of the exclusive privilege to the Louisville Gas Company. They did not think that said grant was invalid because of its being a monopoly or legislation outside of the limit of legislative power. All of the judges agreed that the general subject of the charter was the manufacture and supply of gas to the city and citizens of Louisville; that it was well indicated by the title, and that the act was not unconstitutional by reason that the title of the act did not express the subject of the legislation. But the court agreed to reverse the judgment of the Louisville Chancery Court upon the ground that the charter of the Louisville Gas Company was repealable under the provisions of said act of February 14, 1856, and that the said exclusive privilege granted said company was repealed by the act incorporating the Citizens Gas Light Company. The judgment was as follows:

"The court being sufficiently advised, it seems to them that the judgment herein is erroneous. It is considered that said judgment be reversed and cause remanded with directions to issue a perpetual injunction restraining appellee from claiming and exercising the exclusive right to manufacture and supply gas to the city and citizens of Louisville, which is ordered to be certified to said court.

"It is further considered that the appellant recover of the appellee its costs herein expended." (See pages 57 and 66, printed record.)

For opinions of Judges Hargis and Hines, see pages 57 to 66, and for separate opinion of Judges Pryor and Lewis, see pages 66 and 67, printed record.

These opinions are reported in 81 Ky. R., page 263, etc.

To this judgment of the highest court of the State of Kentucky the Louisville Gas Company sued out a writ of error, and has brought the case here for revision, assigning the following errors:

That the said act of 21st of March, 1872, incorporating the Citizens Gas Light Company, of Louisville, and authorizing it to erect gas-works, open the streets, lay pipes, manufacture and vend gas in Louisville to said city and its citizens, impaired the obligation of the contract between the said State, the Louisville Gas Company, and the city of Louisville, set out in said act of January 22, 1869, that said Louisville Gas Company should have the exclusive privilege for twenty years from January 1, 1869, of erecting and establishing gas-works in the city of Louisville, and of manufacturing and vending gas lights to said city and its citizens; and that its charter should not be altered or amended without the concurrence of the city council and the directors of the said Gas Company.

That said Court of Appeals erred to the prejudice and deprived the said Louisville Gas Company of its said valuable and exclusive right in giving effect to said act of 21st March, 1872, incorporating the Citizens Gas Light Company, adjudging that the said contract between the State of Ken-

tucky, the city of Louisville, and the Louisville Gas Company contained in said charter of said company was repealable by virtue of the 1st section of the said act of the legislature of Kentucky, approved February 14, 1856, and was repealed by the said act of 21st March, 1872, thus giving effect to an act of the legislature of Kentucky which impaired the obligation of the contract aforesaid, and palpably violated section 10, article 1, paragraph 1, of the Constitution of the United States, declaring that no State should pass any law impairing the obligation of contracts.

The foregoing pages substantially present the material facts of matters of this case as they exist in the record, and we now proceed to present our points and argument upon the case.

I. Parties.

The court sees, from the petition in this case, that the Citizens Gas Light Company made the directors of as well as the Louisville Gas Company defendants to the suit. But the writ of error was sued out in the name of the corporation alone.

The directors were made parties upon the theory that the company had no charter, because the subject of the acts of 1867 and 1869 was not expressed in the title of said acts as required by the 37th section, article 2, of the Constitution of Kentucky, which has been cited at length in another part of this brief.

The Court of Appeals having unanimously overruled the point, and held that the corporation was duly created by said acts, and the judgment and mandate of the Court of Appeals, and also the respective opinions of the judges throughout the case having contemplated and referred to the Louisville Gas Company alone as appellee, and the corporation being the representative of all interests, the directors were not considered either as necessary or proper parties to the suit or to the writ of error. They clearly had and have no interest independent of the corporation.

Besides, the Gas Company had a right to sue out the writ of error on its own account.

The judgment of the Court of Appeals embraced and was only addressed to the Louisville Gas Company, appellee.

II. Revisory Jurisdiction.

1. The judgment of the Court of Appeals reversing the decree of the Louisville Chancery Court, and remanding the case with directions to issue a perpetual injunction restraining the Louisville Gas Company, appellee, from claiming and exercising the exclusive right to manufacture and supply gas to the city and citizens of Louisville, terminated the litigation between the parties, and left nothing to be done by the Louisville Chancery Court but to enter the specific judgment of said appellate court. This was a final judgment within the meaning of the act of Congress, for the purpose of revision by this court upon a writ of error. (See Mower v. Fletcher [2 cases], 114 U. S. R. 127; Bostwick v. Brinkerhoff, 106 U. S. R. 3; Atherton v. Fowler, 91 U. S. R. 143.)

The writ of error was properly directed to the Court of Appeals of Kentucky, because its judgment settled finally what the judgment of the court below should be, and remanded the case with such specific peremptory directions as left no discretion in the lower court. (Cases cited above.)

2. It affirmatively appears on the face of the record that a Federal question was raised in the case and presented to the Court of Appeals of Kentucky. We think the question was presented in the original answer; but if it was not distinctly presented in that pleading, it certainly was expressly and clearly raised and set forth in the amended answer filed June 25, 1881. (See pages 53 and 54 printed record.) In that pleading the following allegations are made, viz:

"The defendants for amended answer say that so much of the first section of the plaintiff's said alleged charter as empowers the plaintiff to make, sell, and distribute gas for the

purpose of lighting buildings, public and private, in the city of Louisville, and its adjoining territories, together with the streets, highways, lanes, alleys, parks, and other public places in said city is in violation of the tenth section of article 1 of the Constitution of the United States, because the defendant says it contracted with the state of Kentucky and with the city of Louisville, for a good and valuable consideration, for the exclusive right, franchise, and privilege to open the ground on all streets, alleys, highways, lanes, parks, and other public places in said city for the purpose of laying and repairing pipes for conducting gas, and of making, selling, and distributing gas for the purpose of lighting the buildings, public and private, in the city of Louisville, together with the streets, highways, lanes, alleys, parks, and other public places therein, and that the defendant contracted for said exclusive rights, franchises, and privileges, as well for that part of said city called Portland as for all the rest of said city, and this defendant also contracted with the city of Louisville for such exclusive rights and franchises for twenty years from the 1st of January, 1869. Said contract with the State of Kentucky and this defendant is evidenced by its charter and amendments thereto, referred to in its answer and its contract with the city of Louisville, and is evidenced by its charter and amendments thereto referred to in its answer; and the defendant says that so much of the plaintiff's said act of incorporation as affects or attempts to affect franchises, rights, privileges, and immunities, as before stated, is in violation of the Constitution of the United States, and impairs the obligation of the contract made by the State of Kentucky with this defendant, and plaintiff's said act of incorporation to that extent is void."

As we have before stated, two of the judges of the Court of Appeals of Kentucky held that the grant of the exclusive privilege to the Louisville Gas Company to manufacture and vend gas in Louisville was forbidden by the article and section of the Constitution of Kentucky before referred to, and two held it was not. The effect of this division of the court was to affirm the judgment of the Louisville Chancery Court, so far as this point was concerned; and so in reference to the question of monopoly and special legislation, the division of the court operated to affirm the judgment of said chancery court, so far as they were concerned. But the full

court decided the case against said company upon the ground that the legislature had the power, under the provisions of the said act of February 14, 1856, to repeal and take away from said company its said exclusive privilege granted by the act of 1869, notwithstanding it was *plainly* and expressly declared by the sixth section of said act that no alteration or amendment to the charter of the Louisville Gas Company should be made without the concurrence of the City Council of Louisville and the directors of said company.

There is no pretense that the Louisville Gas Company ever concurred in the passage of the act incorporating the Citizens Gas Light Company.

We thus see from the record that the Louisville Gas Company in its answer claimed a contract with the State, under its charter, for the exclusive privilege granted in the fifth section of the act of 1869, and invoked for the protection thereof section 10 of article 1 of the Constitution of the United States. And we also see that the right and contract thus claimed, and the protection thereof invoked, were held for naught by the Court of Appeals of Kentucky.

We think that an examination of the record and issues raised by the pleadings, independently of the two sets of opinions of the judges of the Court of Appeals copied into it, will show that said court did decide this case upon said Federal question alone, and that its decision was necessary to the judgment rendered.

We have, in another part of this brief, stated the issues raised in this case by the pleadings, and the position of the respective judges of the Court of Appeals of Kentucky in reference thereto.

1. The first issue raised, that the charter of the Louisville Gas Company was void because the subject of the legislation was not expressed in the title of the acts, was overruled by the unanimous opinion of the court.

2. As to the second point, that the exclusive privilege granted by the fifth section of the act of 1869 was in viola-

tion of the first section of article thirteen of the Constitution of Kentucky.

3. And as to the fourth point, that the grant of said exclusive privilege was a monopoly and in restraint of trade and in derogation of public policy, the judges divided—two on each side of said questions. As we have before suggested, the equal division of the court upon said second and fourth points affirmed the judgment of the Louisville Chancery Court. There was then left but the third point based upon the said act of February 14, 1856, and on this point the Court of Appeals distinctly and expressly decided that the legislature had the power, by virtue of said act, to repeal the charter of said Gas Company, and destroy the exclusive privilege thereby granted to it, notwithstanding the sixth section of said act of 1869 declared in plain and express terms that no alteration or amendment to the charter of the company should be made without the concurrence of the City Council of Louisville and directors of said company. It necessarily follows, therefore, that the Federal question raised and involved in this point was decided by said Court of Appeals, and that the judgment of reversal was based upon it alone.

But even if the court should deem it necessary to look at the opinions of the judges of the Court of Appeals copied into the record, in order to see that said court decided the case upon the Federal question, or that the decision of a Federal question was necessary to the judgment rendered by it, we think that it will do so in this case, because the opinions are, under the statutes of Kentucky, a part of the record of the case, and are certified by the clerk under his seal of office.

2. The Civil Code of Practice of Kentucky, section 765, provides that "the Court of Appeals must deliver written opinions in all cases." And the General Statutes require all opinions to be recorded by the clerk of the court. We quote the statute at length (Chapter 16, article 1, title, Clerks):

SEC. 1. Every clerk of a court and deputy, in addition to the oaths prescribed by the Constitution, shall in the presence of the court, before entering on the duties of his office, take the following oath: "I (clerk) do swear that I will well and truly discharge the duties of the office of (style of court) according to the best of my skill and judgment, making due entries and records of all orders, judgments, decrees, opinions, and proceedings of the court, and carefully filing and preserving in my office all books and papers which shall be delivered me in charge, or otherwise come to my hands or possession by virtue of my office; and that I will not wittingly or willingly commit any malfeasance of office, and will faithfully execute the duties of said office without favor, or affection, or partiality."

Under these statutes of the State, the clerk treats and regards the opinion of the court delivered in each case as a part of the record of that case in the Court of Appeals, and copies it into every transcript of that record as part thereof, and certifies it under his seal of office, as he has done in regard to the opinions in this case. These opinions are always preserved with the case and retained in the office of the court.

This court has always received the certificate of the proper judge as to the decision of the Federal question. How much better is the certificate of the judge than the well-considered opinion of the court duly certified by the clerk under his seal of office? Why should not this court look at the opinion of the lower court duly certified to it for the purpose of ascertaining whether a Federal question was decided, or whether its decision was necessary to the judgment rendered?

In the case of Murdock v. City of Memphis, 20 Wallace, 590, this matter was considered. Justice Miller delivered the opinion.

The court referred to the act of 1789, which declared that no other error should be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the aforementioned questions, and then proceeds as follows:

"It is probable that in determining whether one of those questions was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by the express limitation of the inquiry 'to the face of the record.' What was the record of a case was pretty well understood as a common-law phrase at the time that statute (1789) was enacted. But the statutes of the States and new modes of proceedings in those courts have changed and confused the matter very much since that time.

"It is in reference to one of the necessities thus brought about that this court long since determined to consider as a part of the record the opinions delivered in such cases by the Supreme Court of Louisiana. And though we have repeatedly decided that the opinions of other State courts can not be looked into to ascertain what was decided, we see no reason why, since this restriction is removed (by act of 1867) we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court signed by its chief-justice or presiding officer on that point though not as conclusive, and those opinions are quite as satisfactory and may more properly be treated as part of the record than such certificates. . . . And while we are not prepared to fix any absolute limit to the sources of inquiry under the new act, we feel sure it was not intended to open the scope of any loose range of investigation."

This case, therefore, must be regarded as establishing the doctrine that this court will, so far as may be useful or necessary to ascertain if a Federal question was decided by the State court, examine the opinions certified in the record, and a departure from the cases of Williams v. Norris, 12 Wheaton, 117, and Rector v. Ashby, 6 Wallace, 142.

See also Detroit County v. Guthard, 114 U. S. R. 133.

We think enough has been said to show that a Federal question was presented and decided in this case, and that it is clearly within the revisory jurisdiction of this court.

See Choteau v. Gibson, 111 U. S. R. 200; Bridge Proprietors v. Hoboken, 1 Wallace, 143; Armstrong v. Treasurer, &c., 16 Peters, 281.

The fact is that in such a case as the one at bar the jurisdic-

tion of this court is in no way dependent on the reasons given for the decision below. Here is a defendant expressly claiming a contract by legislative act, and the protection of that contract under the Constitution of the United States from the effect of subsequent hostile legislation. If the State court could, by construing away this alleged contract, denying its existence, or in any other method brushing it aside as without original vitality, defeat the jurisdiction of the Supreme Court of the United States, that would be the end of all such jurisdiction in cases of this character. This method of avoiding the Constitution of the United States in its protection of contracts has been often tried. But this court has in every instance declined to allow its lawful jurisdiction to be juggled away. It has declared again and again that it will examine for itself as to whether there was a lawful existing contract, fix for itself the proper construction of it, and then determine whether it has been denied that protection which the Federal Constitution has guaranteed.

This court has taken jurisdiction of cases where the State court had decided for itself this question contrary to the view held below, and then gone on to declare that the contract must be upheld.

So, *converso*, this court has in a case where the court below decided the contract to be originally in existence but subsequently lawfully abrogated, re-examined the first question for itself, and finding the court in error as to the original validity of the alleged contract affirmed the judgment without inquiring whether, if the contract had been originally valid, it was lawfully abrogated. (See for both classes of cases Louisville & Nashville Railroad Company v. Palmes, 109 U. S. R.) In the case at bar, as the plaintiff in error plainly set forth in the record its claim of contract and invoked for it the protection of the Federal Constitution, the revisory jurisdiction of this court was fully assured without any sort of question as to how or for what reasons the State court refused to uphold the contract so alleged to exist.

III. As to the Construction of State Legislation and Constitutions:

This case is not, within the rule of this court, to accept as conclusive the construction given by the courts of the State to State legislation and constitutions, because this court is called upon to decide whether, in the judgment brought up for revision, the highest court of the State of Kentucky gave effect to a subsequent statute of that State which, in violation of the Constitution of the United States, impaired the obligation of a contract contained in a prior statute. In determining this question this court must decide independently of the decision of the Court of Appeals of Kentucky whether there is a contract, even though it be in the form of legislative enactments, and if so, whether that contract has been impaired.

See Jefferson Branch Bank v. Skelly, 1 Black. R. 534, where the question was whether a prior statute of the State of Ohio created a contract between the State and bank, and whether the obligation of such contract was impaired by a subsequent statute of the State.

This case being here for revision, this court, in determining whether in the judgment under review the Court of Appeals of Kentucky gave effect to a law of the State which impairs the obligation of a contract, will, if the decision of the question as to the existence of the alleged contract requires it, construe the State Constitution as well as the various acts of incorporation of the two gas companies, and independently of the decision thereon of the State court. (Louisville & Nashville Railroad Company v. Palmes, 109 U. S. R. 244.)

We shall therefore present and discuss the question of the validity of the grant to the Louisville Gas Company of the exclusive privilege of making and vending gas-light to the city and citizens of Louisville, under both the Federal and State constitutions, as though the lower court had ren-

dered a judgment in the case declaring such grant and the contract for its continuance for twenty years unconstitutional, because inhibited by section 1, article 13 of the Constitution of Kentucky.

IV.

The charter of the Louisville Gas Company, consisting of the acts of January 30, 1867, and January 22, 1869, is a contract between the State of Kentucky, said company, and the city of Louisville, which is under the protection of the Constitution of the United States and also of the State of Kentucky, both of which declare that no law impairing the obligation of contracts shall be made.

This point has so often been before the court, and so frequently decided, that we shall content ourselves with a reference to, and brief quotations from only a few cases.

In the case of Greenwood v. Freight Company, 105 U. S. R. 20, it was said (opinion by Justice Miller):

"In the case of the Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in Fletcher v. Peck, 6 Cr. 87, and the preceding cases, and held that it applied not only to contracts between individuals and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private, as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute were, when accepted by the corporations, contracts which the State could not impair."

In Stone v. Wisconsin, 94 U. S. R., Justice Field said:

"But the charter of a corporation being a contract, a sufficient consideration for the privilege and franchises conferred being found in the duties and liabilities assumed by the corporators, the subsequent power of the legislature is restrained by its terms. This has been so often judicially declared that it has been supposed to be no longer open to discussion."

Farrington v. Tennessee, 95 U. S. R. 679:

The Union and Planters Bank of Memphis was organized under a charter granted by the General Assembly of that State, of May 20, 1858 (amended February 12, 1869), the 10th section of which provides that said company shall pay to the State an annual tax of one half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes.

Section 1 of an act of said State, of 1869–70, C. 81, provided "that all shares of stock in any bank institution or company, now or hereafter incorporated by or in pursuance of any law of this State or any other State, . . . should be valued and assessed and subject to taxation." It was held that the provision as to paying annually one half of one per cent on each share of the stock of said bank was a contract between the State and the bank, and that a subsequent revenue law of the State imposing an additional tax on the shares in the hands of stockholders impaired the obligation of that contract, and was void. The court, through Judge Swayne, said:

"This case lies within narrow limits. The question to be decided arises under the Constitution of the United States. The ground of the discussion has been well trodden, little is left for us but to apply the work of others."

In the case of the Wilmington R. R. v. Reed, 13 Wallace, 266, the charter contained an exemption of all the property of the corporation from taxation. In delivering the opinion Justice Davis said:

"It has been so often decided by this court that a charter of incorporation granted by a State creates a contract between the State and the corporators which the State can not violate, that it would be a case of supererogation to repeat the reasons on which the argument is founded."

The same judge asserted the same facts and doctrines in the Binghampton Bridge case.

In the case of Gordon v. Appeal, Tax Coms., 3 Howard, 133, it was held that when the legislature of a State accepted from banking corporations a bonus as a consideration for the franchise granted, with a declaration that it was to be in lieu of any further tax or burden, that a tax upon the stockholders by reason of their stock was a violation of the contract.

See also New Jersey v. Yard, 95 U. S. R. 113; Dodge v. Wolsey, 18 Howard, 331; Stone v. Wisconsin, 90 U. S. R. 185; Knoop v. The State, 16 Howard, 369; Cooley's Constitutional Limitations, 5th Ed., top page 150; Bridge Proprietors v. Hoboken, 1 Wallace, 116; Bank of Cape Fear v. Edwards, 5 Iredell (N. C.) L. 516; The Union Bank v. State, 9 Yerger (Tenn.), 490; Boston & Lowell R. R. Bridge v. Salem & Lowell R. R. Co., 2 Gray, 1.

We now quote a few Kentucky cases which are as decided and consistent as are those of this court.

In the case of Keith v. Hamilton, 5 Bush, 458, the Court of Appeals of Kentucky was very clear and emphatic upon this subject. The charter of the road was passed prior to 1856, and an amendment to said charter was passed February 6, 1854, and neither were subject to repeal, there being no right to repeal them reserved in said acts. The sixth section of the amended act of 1854, granted certain rights and privileges to the company, which the legislature attempted to alter by an act of 1869. The last amendment was not accepted by the company, and, a proper case upon the act of 1869 having been made, the case was appealed to the Court of Appeals. That court held in substance that acts of incorporation were contracts within the meaning of paragraph 1,

section 10, article 1 of the Constitution of the United States, and section 20, article 13 of the Constitution of Kentucky, that laws impairing the obligation of such contracts were unconstitutional, and the court referred to the Dartmouth College case "as that able, searching, exhaustive, and unanswerable opinion of Chief-Justice Marshall."

See also City of Louisville v. University of Louisville, 15 B. Mon. 632; Louisville & Portland R. R. Co. v. Louisville City Railway Co., 2 Duv. 175; Johnson v. Commonwealth, 7 Dana, 342, decided 1838.

In the latter case the legislature passed an act by which the Northern Bank of Kentucky, at Lexington, was exempted from ordinary taxation, and required to pay a special annual tax at no time to exceed fifty cents on each $100 of stock. An effort was made to subject said stock to other tax, and the lower court upheld the effort. Upon appeal by Johnson to the Court of Appeals of Kentucky, the court held that it was within the legislative power to make such exemption, and that the tax or bonus prescribed by the charter was intended to be a limitation on the legislature to tax the stock, and that this was a contract between the stockholders and the State, and was inviolable.

See also the case of the Farmers Bank of Kentucky v. The Commonwealth and Greenup County, 6 Bush. (Ky. R.) 127, wherein the same doctrine is declared and enforced. And, we may add, that similar provisions were generally incorporated into the bank charters, and many other commercial and moneyed corporations of this State, and were always recognized and respected as contracts betwixt the State and the stockholders, and under the protection of the Constitutions of the United States and of the State of Kentucky.

The Louisville Gas Company, chartered in 1838, had the same exclusive privileges, and enjoyed it without question.

In 1847 such an exclusive right was given in the Lexington, Ky. Gas Company charter for thirty years, and in the Covington, Ky. Gas Company charter, in 1854, for fifty years, and both grants were enjoyed by said corporations.

A similar grant has been sustained in Massachusetts, and the law of that State is settled in maintaining the inviolability of grants of exclusive privileges to persons and corporations.

In the case of the State of Wisconsin v. Milwaukee Gas Light Company, 29 Wis. 454, it was held that the legislature of that State might confer upon a private corporation the exclusive right to manufacture and to sell gas, and to erect works and lay pipes therefor, within the limits of a municipal corporation.

See also Shepherd v. Milwaukee Gas Company, 6 Wis. 546.

State v. Cincinnati Gas Light Co., 18 Ohio State, 262.

Taylor v. Carondelet, 22 Mo. 110.

Cresent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Annual.

Gas Light Co. v. Colliday, 25 Md.

People v. Manhattan Gas Light Co., 45 Barb. 136.

The power to enact such laws and confer such rights as are under consideration has always been exercised in Kentucky. The Constitution in existence at the time the present one was adopted had in it the same clause which is relied on to defeat the grant under consideration. The statute books of the State, from the beginning of the government down to the last session of the legislature, contain acts exempting infants and married women from disabilities, changing venue, granting divorces, allowing persons to peddle without obtaining the license required by general laws, relieving persons from taxes, exempting property from taxation, giving partial or entire, temporary or permanent relief therefrom, granting exclusive or special privileges to corporations and individuals, and the right and authority to enact this character of legislation has been recognized, admitted, and upheld as valid legislative contracts by all branches of the State government. Many acts of this character are still in force.

We think we have said enough upon this particular branch

of our case. The charter of the Louisville Gas Company is a contract. so regarded by both Federal and State decisions. The contract obtained by the Louisville Gas Company in the act of 1869 for the exclusive privilege of erecting gas-works, making and vending gas to the city of Louisville and its citizens, has been violated and destroyed by the charter granted to the Citizens Gas Light Company, and by the judgment of the Court of Appeals of Kentucky sustaining said last named act and repudiating the agreement contained in the sixth section of the said act of 1869, guaranteeing the enjoyment of said charter and its benefits for twenty years. The subject is further elaborated by the discussion of the eighth point of this brief under the head of "police powers," and the cases there quoted.

V.

The grant in this case is not a public emolument in the meaning of the Constitution of Kentucky.

In the case of the Commonwealth v. Whipps, 80 Ky. R. 272, in discussing the meaning of the first section of the thirteenth article of the Constitution of Kentucky, the court thought "that such privileges were merely special or exceptional, as contra-distinguished from the exclusive privileges referred to in that section, and said that if it was made to apply to the exercise of mere private rights or special privileges, it would nullify almost innumerable legislative enactments that are to be found in our private statutes, sanctioned in many instances by every department of the State government. The long practical construction of this clause of the Constitution should be held conclusive as to the interpretation thereof, and such the court held in the case of Pennington v. Wooldfork, 79 Ky. R. 25."

See also United States v. Graham, 110 U. S. R. 219.

Cooley's Constitutional Limitations.

See also the following cases involving questions of special, or exceptional or exclusive privileges:

Johnson v. Commonwealth, 7 Dana, 342, 1838.

Bradley v. McAtee, 7 Bush, 674, 1870.

City of Henderson v. Lambert, 8 Bush, 608, 1871.

Nazareth Literary Institution v. Commonwealth, 14 B. Mon. 266, 1833.

Patterson v. Trabue, 3 J. J. Marshall, 598, 1830.

Kibby v. Chetwood, 4 Mon. 91, 1826.

Shehan's Heirs v. Barnett's Heirs, 6 Mon. 592, 1828.

O'Hara v. Lexington and Railroad Co., 1 Dana, 232, 1833.

Commonwealth v. Jackson, 5 Bush, 680, 1868.

In opposition to the cases cited and the great number that might be, are the cases of

Smith v. Warden, 80 Ky. 609.

Gordon v. Winchester, 12 Bush, 110.

Kentucky Trust Co. v. Lewis, Sixth Ky. Law Rep. 547.

Barbour, Sheriff, v. Louisville Board of Trade, MSS. opinion.

In Smith v. Warden, the legislature granted a special act giving a clerk a longer time within which to collect his fees than was allowed by general law to all other clerks. The session acts of our legislature show very many acts of this kind. (See case in Eightieth Ky. Rep. 609.) In Kentucky Trust Co. v. Lewis, a right was given to a corporation to sell land mortgaged to it, without the intervention of a court. The court said this was class legislation, and admitted that the views expressed were not in accord with the well considered case of Hahn v. Pendell, 3 Bush, 189, where a similar legislative authority was sustained.

In the Board of Trade case the property of the corporation in Louisville was exempted from all taxes by an amendment to the charter. This case is very surprising and extreme. This rule is laid down and the judgment based thereon, viz: "That, as a general rule, the test of the right to exempt property from taxation is the existence of the right to levy a tax to foster said property." This rule excludes from exemption banks, seminaries, provisions, universities, colleges, real

estate belonging to charitable institutions, houses of worship, and all of the exempted articles mentioned in section 3, article 1, chapter 92 of the General Statutes of this State. The extreme and novel positions assumed in this case best answer its conclusions. Besides, there was a vigorous dissent by Judge Pryor. In none of these cases was there, the court said, a consideration of service or duty for the benefit of the public given for the privileges conferred; and this fact is also prominently commented upon in the case of Kentucky Trust Company v. Lewis. Nor was there any consideration given for the privileges conferred upon the Loan Association in the case of Gordon v. Winchester, and in this respect the four disagreeing cases are distinguishable from the case at bar.

The grant to the corporation in the last named case was the privilege of loaning money at a special and greater rate of interest than was allowed by general law to others. The ruling in it was disapproved in the case of the Commonwealth v. Whipps, 80 Ky. R., *supra*, and was never satisfactory to the profession in Kentucky. We think that the long list of precedents found in our reports and statute books would sustain that grant upon the ground that it was but a special or exceptional privilege, not a public emolument in the meaning of the Constitution.

The separate public emoluments or privileges referred to in the Constitution of Kentucky are political rights, public privileges, and not the exercise or enjoyment of a special or exceptional privilege.

Commonwealth v. Whipps, 80 Ky. R. 269.

Williams v. Cammack, 27 Miss. 218.

Peck v. Critchton, 7 How., Miss. 247.

The State of Mississippi has a clause in its Constitution like that of our own.

See also——Street Railway Company v. Union Pacific Railway Company, 31 Kansas, 660.

We respectfully suggest that, in view to the fact that the

case of Whipps v. Commonwealth is in conflict with Gordon v. Winchester, and the earnest dissent of Judge Pryor in the Board of Trade case, the ruling of the court in the Board of Trade case can not be considered as the settled construction in Kentucky of the clause of the Constitution under review. Therefore, this court is not bound to accept the interpretation put upon it in that case. We may say, confidently, that these four inharmonious cases are merely oscillations in the course of judicial construction of the Constitution of this State.

In the case of Gulpcke v. City of Dubuque, 1 Wall. 175, it is said:

"Although it is the practice of this court to follow the latest settled adjudications of the State courts giving constructions to the laws and institutions of their own States, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication to such an extent as to make a sacrifice of truth, justice, and law."

V. Consideration.

If the duties and liabilities assumed by the Louisville Gas Company for the grant of the exclusive privilege contained in the fifth section of the act of 1869 are not a sufficient consideration therefor, and if a valuable consideration, co-extensive with the value of said grant, is required to make it a valid and binding contract between the State and said company, then such a consideration exists and was given to the State and city of Louisville therefor. We proceed to show this.

By turning to the sections of the charter of January 30, 1867, of said company, quoted heretofore, it will be seen that, by the fifth section thereof, the company was required to extend its main pipes only when the public and private lights required by the city and citizens would pay 8 per cent profit on the cost of extension; and by the seventh section thereof the company were required to erect lamp-post fixtures, etc.

along the street mains as they were extended; to furnish gas for the lamps at actual cost; the charge for keeping lamps in order, lighting, and extinguishing them, to be based upon the average charges of similar services in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, and the price of gas to private consumers was to be the average of price of gas to such consumers in said cities.

The third section of the act of January 22, 1869, the provisions of which, as we have shown, were agreed upon between the city of Louisville and the Louisville Gas Company, and intended as a satisfactory settlement of all differences upon the subject of furnishing gas to the city and citizens, and as a sufficient protection of the private consumers of the city against improper charges for gas to be furnished them by said company, very much modified the seventh section of the act of January 30, 1867, and made the duties of the company more onerous, and its business of manufacturing and selling gas very much less profitable to the company and stockholders.

By said third section of said act, which repealed and took the place of the said seventh section of the act of January 30, 1867, the company was required,

1. To furnish public lights to the city at actual cost, and in no event, no matter what the lighting of such lamps might actually cost the company, should the cost to the city exceed $35 per lamp; and no separate charges for the services necessary to light and extinguish the public lights, and keep the lamps in order, was allowed.

2. The charge of gas to private consumers was to be so graded that the company's profits should not exceed 12 per cent per annum, on the *par value* of the stock, 10 per cent of which might be distributed to the stockholders in semi-annual dividends; the remaining 2 per cent to be laid out in extensions, and not to be capitalized except at the end of every five years.

By the second section of said act the company was re-

quired to extend its main pipes whenever the public and private lights arising from said extensions would pay 7 per cent profit on the cost thereof, and so much of the fifth section of the act of January 30, 1867, as required an extension of the main pipes, when the profit of such extension would pay 8 per cent was repealed.

3. By the fourth section the company was made a trustee for the city of Louisville, and required to invest all unused dividends belonging to the city, with the concurrence of the city council, and to hold the sum as a permanent trust during the life of the charter. By the amendment, therefore, the city of Louisville gained for itself and its citizens:

1. The public lights at actual cost, and besides an agreement that even if it cost more than $35 to light each lamp, still the company was limited to that sum, and the separate charge for keeping the lamps in order, and lighting and extinguishing them was surrendered.

2. The extension of gas mains and pipes when the consumption would yield a profit of 7 per cent per annum.

3. A trustee to invest its unused dividend and hold the same in permanent trust until the end of the charter.

4. There was provided a fund of 2 per cent per annum, absolutely devoted, without any condition, for extension of gas mains and area of gas lighting.

5. A limitation upon the per cent of profit the company might make on sale of gas to private consumers, allowing only twelve per cent per annum instead of the average of the price of gas furnished to private consumers in the cities before named; and, besides these considerations, the Gas Company agreed by its charter of 1867 to pay to the State 50 cents on each $100 of its capital stock, which was a very much larger tax than was paid by tax-payers under the general laws of the State.

It will be seen at once that the effect of the limitation upon the profit which the company was allowed to make on its manufacture and sale of gas was necessarily to reduce its

cost as consumption increased, and in this way the legislature made the very prosperity and success of the company the constant competitor of the price of gas and of profit, for as population and consumption and area of gas lighting grew and increased, the price was necessarily constantly being graded down and diminished by the profit arising from increased consumption. It is apparent that the limitation upon the per cent of profit the company was allowed to make, being based upon the par value of the stock and the prohibition against capitalization, were large concessions on the part of the company in favor of the public, and operated as a material factor in reducing the price of gas to the citizens.

It is also apparent that in surrendering the right to have eight per cent profit on extensions and agreeing to extend upon a profit of seven per cent per annum, that the company gave up a very valuable right and made a very valuable concession to the general public. This agreement had the effect of pushing the mains and sewer pipes out into the thinly populated districts of the city, stimulating the growth and expansion of the city, and bringing into market and enhancing the value of outlying and remote property.

These very valuable considerations were co-extensive with the exclusive privileges granted the company by the 5th section of its amended charter, approved January 22, 1869.

We have been impelled to set out in some detail, and with some degree of particularity, the consideration given by the Louisville Gas Company for its exclusive privilege of erecting gas-works and manufacturing and selling gas to the city and citizens of Louisville, because, in the principal opinion emanating in this case from the Court of Appeals of Kentucky, it was stated that said grant was a mere gratuity. And we add, as a matter of fact, and as shown by the record of this case, that the act of January 30, 1867, extending the charter of the company, had not gone into effect when the provisions of the act of 1869 were settled upon between said

company and the city of Louisville. The record shows that the amendments actually passed both boards of the general council before the 1st of January, 1869, the time at which the extended charter was to go into effect, and before the company had done any act under said act of 1867; and both the city of Louisville and the Gas Company, before and at the time it did take effect, believed, and acted upon the belief, that the exclusive privilege and other provisions of said amendatory act of January 22, 1869, would be incorporated into a law by the legislature of the State, and both of said bodies, from the time the amendment was agreed upon, regarded it as much a part of the charter as if it had been originally incorporated in said act of 30th January, 1867. By accepting the charter the company came under an obligation to furnish gas to all the citizens who applied therefor, upon the terms prescribed in said act of 1869.

Gas Light Company v. Colliday, 25 Md. 1.

People v. Manhattan Gas Light Company, 45 Barbour, 136.

Shepherd v. Milwaukee Gas Light Company, 6 Wis. 546.

Weymouth v. Penobscot Driving Company, 71 Maine, 29, 38.

This undertaking and contract, upon the part of said company, were a valuable and sufficient consideration for the grant of the exclusive privilege of making and vending gas to the city and citizens of Louisville.

It is to be observed that Judge Hines, in order to maintain the indefensible conclusion asserted in the opinion rendered by him in this case, was compelled to take the ground that the grant to the company of its exclusive privilege aforesaid was a mere gratuity.

VI.

We come now to consider the character of the services required to be rendered by said Gas Company in behalf of the city and citizens of Louisville.

We contend that the furnishing of gas and lighting up of the streets, wharves, engine-houses, city halls, and offices, council chambers, and other property of the municipal government is a public service in the meaning of the Constitution of Kentucky, and will uphold a grant of exclusive privilege to the party that undertakes to perform such service; and the furnishing of gas to the community generally in their buildings, churches, places of amusement, public and private parks, railroad depots, telegraph offices, and newspaper offices, and publishing houses, manufactories, hotels, etc., at a *price limited by statute*, are services of a public nature, in which the entire city community is interested and by which they are benefited. We understand and respectfully suggest that any service, the performance of which is essential to the public welfare, or which is advantageous to, or promotes the business interests and transactions and convenience of the public generally, is a public service in the meaning of the Constitution—that the agreement to render such services will uphold a grant like the one under consideration; and that it is within the scope of governmental authority to encourage the undertaking of such services in behalf of the public by holding out reasonable inducements to those who will undertake to render them.

The first authority we quote upon this point is the separate opinion of Judges Pryor and Lewis in this case. They say:

"The municipality of the city of Louisville being a part of the State government, the necessity for gas-lights upon its streets and in its public buildings is almost as essential as the streets that are lighted by it. It is a public necessity, and where a contract is made to supply this public necessity with gas for a limited time, and that does not by its terms create what is termed a monopoly at common law, the contract is binding."

In the case of Patterson v. Trabue, 3 J. J. Marshall, 598, the legislature granted to Trabue and others the exclusive

right to appropriate at any time within two years five thousand acres of the public lands situated within five miles of the place where they were boring for salt water, not interfering with any actual settler at the date of the act. Patterson caused a survey to be made for eighty acres within less than four miles of the place where Trabue was boring for salt water, and Trabue took steps to prevent the issual of a patent to Patterson. Among other things, it was claimed that the act in favor of Trabue was in violation of the Constitution prohibiting the granting of exclusive privileges.

The grant to Trabue was sustained, the court saying: "That by the reservation Trabue was encouraged to pursue and expend his money in pursuit of salt water, the finding of which is of public utility."

Here, then, is a valuable consideration in the public advantage or in the private loss of Trabue, either of which would be sufficient to support a contract, if the act of 1820 were looked upon in that light.

This case is a judicial construction of the terms, "public services," occurring in the 1st section of article 13 of the Constitution of Kentucky. The present and prior constitutions have identically the same provisions on this subject. (See also O'Hara v. Lexington & Ohio Railroad, 1 Dana, 230.)

Such services as are demanded of and performed by the Louisville Gas Company were considered public services in the case of Shepherd v. Milwaukee Gas Light Company, 6 Wis. 546.

In that case the court said that, whenever, by accepting such privileges, the grantor became bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for the legislature, being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive both as to the necessity for making the grant and the amount of ser-

vice to be rendered in consideration therefor, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to him to be.

Bringing water to cities and villages is a public service. Tide-water Company v. Coster, 3 C. E. Green. In Morawitz, Priv. Corp., sec 498, it is said: "Water companies for supplying cities and villages, and gas companies for laying gas-pipes and lighting the streets render public services. In Lumbard v. Stearns, 4 Cush. 60, it was said that the business of supplying a village with pure water is a public use.

In the reported cases we have cited and in the separate opinion delivered in this case by Judges Prior and Lewis, the conclusions reached were based upon the proposition that a public service, in the meaning of the Constitution, is one which meets and relieves the wants and necessities of the community and answers the demands of public convenience.

There is no reported case in Kentucky known to us in which a special privilege granted was held unconstitutional when coupled with the performance of a public service; and even the Board of Trade case is not adverse on this point.

It needs no evidence to enable the court to know that in any large city, as populous and active as Louisville, a great deal of business is transacted after dark. A very large amount of freights, and a great number of passengers are transferred over our streets during the hours of the night. Much of the business of the community is necessarily carried on in the night time. The people in the transaction and prosecution of their business, or in the lawful indulgence of their right to attend their churches or places of amusement, or in the discharge of their social obligations and duties, are compelled to use the streets of the city at night; hotels, railroad depots, printing offices, telegraph offices, and many other public places, must be kept open and be lighted at night. Then can any one say that gas for the city and citizens is not a public necessity? It is far more

necessary than salt water was in 1820, or the small strip of O'Hara's land taken in 1830 for railroad purposes by a private corporation.

The streets of Louisville are its highways. That it is a governmental duty to make the highways safe is universally admitted. The gas in Louisville is absolutely essential to the safety of the streets. Remove the lights and the streets and alleys would soon teem with thieves and robbers and become unsafe for passengers. Commerce would be subject to the depredations of the most vicious classes of metropolitan population, and life itself exposed to constant hazard. It is the duty of the municipal government of Louisville by itself, or through the agency of corporations or individuals, to see that its highways are made secure for all the lawful uses and purposes of the community. The Louisville Gas Company has performed this duty for the city, by erecting lamp-posts and furnishing lamps and gas for lighting the streets, and in so doing does not it render public service? Does it not even perform a govermental function?

The principle we are contending for has been established by the Federal Government. It recognizes its duty to the public of lighting the coasts, lakes, navigable rivers, and entrances to harbors. The shoals and dangerous places on the Ohio, Mississippi, and other rivers are pointed out to the navigators of those streams, by lights and buoys set in conspicuous places along the shores and kept at governmental expense. The Court of Appeals of Kentucky has recognized the duty of the State to improve its navigable streams, and its right to make contracts and grant valuable privileges to those who will perform such services for it. (Commissioners' Sinking Fund v. Green & Barren River Navigation Co., 79 Ky. Rep. 78.) We can not understand why the improvement of the streets of Louisville, making them safe for the use of the people by day and night, is not a governmental duty and a public service by whomsoever performed, as much so as placing lights on the shores of our lakes, rivers, and seas. It

is clear to our minds, that the lighting of the streets of Louisville and the public places, parks, and buildings of that city is an absolute public necessity.

We may add that those acts and services which constitute "public services," in the meaning of the Constitution, can not be catalogued or inventoried, nor can they be limited except by the growing needs of the community. The list of public services has kept even pace with public wants, and will keep abreast of them. Some things which were of public necessity in the past are not so now, and others which were not essential heretofore, are required to-day to meet the wants of the public. We may instance gas, water for our cities and manufactures, the telegraph and telephone. The public can not dispense with any of them any more than it could get along without railroads, bridges, ferries, and school-houses. So long as our civilization progresses and develops, so long will new public wants arise; and so long as this continues, so long will it be the duty of the government to extend inducements to enterprise and capital to relieve them.

We can not sit down in this age of progress and broadening civilization and say that a ferry, or a road to the court-house, or a school-house are the only matters of governmental care and duty, or that the supplying of these are alone public services. We can not complete and close the schedule until our civilization has turned back, or at least fully culminated. It is impossible to prescribe an inflexible rule for ascertaining or determining what is a public want or service, or to limit the constitutional meaning of the words, "public services," except by the wants and necessities of the public, as they may at any time exist. And we say this carefully discriminating in our minds between the public and the individuals composing the public, and between public wants and public good and mere private or individual convenience and benefit. It is also to be observed that in order to maintain the conclusion asserted in the opinion rendered by Judges Hines and Harges, they were driven to deny that the services rendered

by the Louisville Gas Company to the city and citizens of Louisville were public services.

We will here notice the Norwich Gas Light Company case, 25 Conn. 19, relied upon by two of the judges of the Court of Appeals of Kentucky, to sustain the positions assumed by them, that the services required of the Louisville Gas Company and rendered by it for the city of Louisville are not public services in the meaning of the Constitution of Kentucky, and that the grant to said company was a monopoly.

The original charter in that case was passed in 1854, and the grant of an exclusive privilege of laying gas-pipes through the streets of Norwich to distribute gas for the purpose of lighting the streets, buildings, etc., was given by an amendment passed in 1855. The grant was not upheld. We quote from that case to show the grounds upon which the court based its adverse judgment. Among other things it said:

"The plaintiffs were under no obligation to make gas, or suffer gas which they might make to be used. They are restricted in the price of what they do sell, but there is no provision that they shall sell to any one who may apply for it, or to so many as they may be able to accommodate. In this respect there is a broad distinction between this and the grant of a bridge or ferry or ferry franchise. The most valuable interest in the bridge and ferry grants is the right to take tolls, and this right is never granted unless it is founded on an adequate consideration which in the case of a ferry consists in an obligation to keep boats for the transportation of passengers, etc., and in the case of a bridge in erecting and keeping it in repair for the accommodation of all who may have occasion to use it (pages 36 and 37): . . . Again, it is the duty of as well as the prerogative of the government to provide necessary and convenient roads and bridges (the judge says the streets of Norwich are public highways), and in this case the power to provide for lighting the streets is of no importance, because nothing was done to secure the object unless the plaintiff chose to assume it, and whether they will do so, would probably depend upon whether it could be made profitable. As then no consideration whatever, either of a public or private character, was reserved for the grant, and as

the business of manufacturing and selling gas is an ordinary business like the manufacture of leather or any other article of trade in respect to which the government has no prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly."

Had the company been bound to furnish gas to the city or citizens of Norwich, or to extend the area of gas-lighting, or to light up the streets and public places as the Louisville Gas Company, by its charter, is bound to do, in all probability the court would have found that they were public duties, that the rendition of such services were a sufficient consideration for the grant to said company, and that such a contract and such services would have relieved the company of the crime of being a monopoly. The position assumed by the court that the manufacture and sale of gas was an ordinary business like the manufacture of leather or any other article of trade, is opposed by the later and better considered cases of Shepherd v. Milwaukee, 6 Wis. 546, Gas Light Company v. Colliday, 25 Md. 1, People v. Manhattan Gas Light Company, 45 Barbour, 136, and was necessary to sustain the court in declaring the grant a monopoly.

In the first mentioned case, 6 Wis. 546, the court clearly held that the business of manufacturing and furnishing gas for lighting the streets, places of business, and dwellings of Milwaukee was not a mere private and ordinary business; that, from the nature of the article, the objects of the company and their relations to the community, the company was not at all analogous to ordinary manufacturing or trading corporations.

There is no statement of the court in the Norwich case, as we have read it, that militates against the point for which we contend, to wit, that the extension of the area of gas lighting in a large city, furnishing gas and lighting its streets

and public places is a public service in the meaning of the Constitution.

And now we submit that, if the grant to the Louisville Gas Company of the exclusive privilege contained in the fifth section of the act of 1869 be "an exclusive separate public emolument," in the meaning of the Constitution of Kentucky, then the Louisville Gas Company gave a full consideration of public services therefor, and thus the grant thereof was valid under the fundamental law of the State of Kentucky, and the contract for the enjoyment thereof is under the protection of the Constitution of the United States.

VII. Monopoly.

We will now notice the point made by the Citizens Gas Light Company, that the exclusive privilege to the Louisville Gas Company is a monopoly at common law, and therefore void.

The only support for this proposition, so far as we have seen, is the Norwich gas case above discussed. But being so unlike the case at bar in all material respects, as we have pointed out, it can not be regarded as an authority upon which to base a judgment against the Louisville Gas Company.

To constitute a grant a monopoly at common law, there must be no consideration for it, and it must be either unlimited in terms, or if limited, the term of its enjoyment must be unreasonable. Neither of these objections can be urged against the grant to the Louisville Gas Company, for it is based upon the valuable considerations of public services, the surrender of valuable rights by the company, and the assumption of the onerous duties and obligations already pointed out; the price of gas to the city and citizens is limited, the profit on sale is restricted, and the exercise and enjoyment of said grant is limited to a period of time considered reasonable by two of the judges of the Court of

Appeals, and which hardly equals, certainly does not exceed, the time usually given in the creating of such corporations. The company is under severe restrictions, and its rights as a manufacturer are greatly abridged by the law of its existence.

VIII. Title of the Gas Company Charter.

The title of the act of 1867 is, "An Act to extend the Charter of the Louisville Gas Company," and the title to the amendatory act of 1869 is, "An act to amend an act entitled 'an Act to extend the Charter of the Louisville Gas Company,' approved January 30, 1867."

It is not contended that the charter contains more than one subject. The only constitutional objection urged against it is that the word "extend" does not express the subject of the act; that the title should have been "An Act to incorporate the Louisville Gas Company." Therefore, the point made to the court was that the charter of the company must be declared void, because the legislature used the word "extend" instead of "incorporate" in preparing its title.

We have already mentioned that the unanimous opinion of the judges of the Court of Appeals of Kentucky declared there was no constitutional objection to the title of the act. The court said that the general subject embraced in the act was the manufacture and supply of gas to the city and citizens of Louisville, and that that subject was as well indicated by the term "extend" as it would have been by the word "incorporate."

In the case of Phillips v. Covington & Cincinnati Bridge Company, 2 Met. 222, the charter of the company was amended by an act, the title of which was "An Act to amend an Act to amend the Charter of the Covington & Cincinnati Bridge Company."

By the first section of the act the capital stock was increased, and by the second power was conferred on the bridge company to sell, and on the city of Covington to subscribe for

$100,000 of the capital stock, to sell bonds of the city to pay for said stock, and to levy a tax for the payment of interest thereon.

It was contended that this act was unconstitutional, because in violation of section 37, article 2, of the Constitution. It was not denied that the provision of the 2d section so far as it related to the Bridge Company was consistent with the title; but it was urged that so far as it related to the city of Covington it was entirely foreign to the object therein indicated.

But the court held that the act was not in conflict with the Constitution, and after stating the reason for the adoption of this constitutional provision, said "that such a construction should be given to it as is necessary to render it effectual in accomplishing the object for which it was designed. . . . The prohibition should receive a reasonable not a technical construction, and, looking to the evil to be remedied, it should be applied to such acts of the legislature alone as are obviously within its spirit and meaning. None of the provisions of a statute should be regarded as unconstitutional where they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title."

This provision came under the consideration of the court in the case of Howland Coal and Iron Works v. Brown, 13 Bush, 681, and the rule laid down in the case just above referred to was approved and reiterated. The act in question was entitled, "An Act to create a Criminal Court in the Fourteenth Judicial District." The 14th section conferred jurisdiction on said criminal court of actions by equitable proceedings. It was contended that the title was so restricted as to limit the act to criminal jurisdiction alone. It was conceded that if the title had read "An Act to create an Equity and Criminal Court," the 14th section would have been embraced by the title. The court said that the courts could not enlarge the scope of the title, but would construe

it liberally so as to sustain all the provisions of the act not clearly beyond the purview of the title, and the act was upheld.

See also to same effect Louisville & Oldham Turnpike Road Company v. Ballard, 2 Met. 168.

McReynolds v. Smallhouse, 8 Bush, 453.

Chiles v. Drake, 2 Met. 146.

Johnson v. Higgins, 3 Met. 569.

The rule laid down in these cases is the settled judicial interpretation put upon section 37, article 1, of the Kentucky Constitution by the Court of Appeals of Kentucky.

New York, Illinois, Iowa, and Pennsylvania have clauses in their respective constitutions similar to the 37th section of article 1 of the Constitution of Kentucky, and the courts of each of said States have construed them as the courts of this State have construed the Kentucky Constitution.

See The People v. Laurence, 36 Barbour, 136.

Same v. Fancher, 50 N. Y. 290.

Brewster v. City of Syracuse, 19 N. Y. 116.

O'Leary v. Cook, 28 Ill. 535.

Dinscombe v. Pivoli, 12 Iowa, 1.

Blood v. Moralliott, 53 Penn. St.

The title of the charter of the Louisville Gas Company gives notice that the act was concerning gas; that it was about a gas company already existing, and that the corporate powers were not to expire. This was sufficient to inform every one of the subject of the legislation proposed. The office of the title of the act is simply to give notice of the subject, not the object or purposes of the act. It is the matter to which the statute relates, and not what it proposes to do, which is to be indicated by the title.

We submit that the title of the company's charter complied with the constitutional requirement as held by the full court.

IX. The Police Power.

It is, however, claimed that while the legislature may grant to a corporation the exclusive right to supply a city with gas, yet that the power to make the grant is a part of the police power of the government, and that no part of the police power can be granted away. Therefore it is said, even if the charter of the Louisville Gas Company was originally valid, still the legislature might subsequently repeal it. The leading authority cited in support of this contention is Butchers Union Company v. Crescent City Company, 111 U. S. 763.

The proposition may be stated in one of two ways.

Thus it may be contended that the grant is within the police power, and that no grant within that power can ever be irrevocable.

Or it may be contended that the grant is within the police power, and that while some grants within that power are irrevocable yet others are revocable, and that under the latter class falls this especial grant.

The first inquiry is as to whether the grant is within the police power at all. In speaking of this power Mr. Justice Miller, in the Slaughter House cases, 16 Wall. 62, said:

"This is called the police power; and it is declared by Chief-Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries or prescribe limits to its exercise.

"This power is, and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of our existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."

It would be very difficult to state any power of government outside of the police power, starting with a definition as broad as this.

But the question here is not simply as to whether this grant is within this largest definition of the police power,

but as to the right of the legislature to revoke any grant made by it which can be included in such definition.

To this proposition there is, we believe, no authority, and the analogies of the cases are certainly the other way.

Let us cite a few expressions from the opinions of learned judges upon this subject.

In the case of Butchers, &c. v. Crescent City Company, 111 U. S. 750, Mr. Justice Miller said:

"Nor does this proposition contravene the established principle that the legislature of a State may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed nor its obligation impaired. The examples are numerous where this has been done and the contract upheld."

"While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it can not, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are *the public health* and *public morals*. The preservation of these is so necessary to the best interest of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

In the same case Mr. Justice Bradley says (763):

"I do not mean to say that there are no exclusive rights which can be granted. . . . So an exclusive right to use franchises, which could not be exercised without legislative grant, may be given; such as that of constructing and operating public works, railroads, ferries, &c. In such cases a part of the public duty is farmed out to those willing to undertake the burden for the profits incidentally arising from it."

In the *Slaughter House Cases* Mr. Justice Field said:

"It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the

exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions under which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may, of course, stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges of a right thus appertaining to the government, is a very different thing from a grant with exclusive privileges, of a right to pursue one of the ordinary trades or callings in life, which is a right appertaining solely to the individual." (16 Wall. 88.)

And in the same case as reported below, *Live Stock Association* v. *Crescent City Company*, 1 *Abbott U. S. Rep.* 399, Mr. Justice Bradley said:

"This sacred right of labor is not inconsistent with the exclusive right to use a franchise; that is, a right to do what the legislature alone can authorize to be done and which no private citizen has a right to do without such authority; such as to build and operate a railroad, to make a canal or turnpike, to establish a ferry and other such public rights which involve a charge upon the public and in most cases an exercise of the right of eminent domain. These franchises may be conferred upon a limited number of persons, natural or corporate, with power and even exclusive power to exercise them in certain localities on certain terms and under certain restrictions. Society obtains a consideration for the grant of these franchises in the investment of large amounts of capital in public improvements which are required for the development of the country and its resources. They are franchises which can only be exercised as they are conferred by public authority, and can not be exercised or enjoyed by all. They are far different from those ordinary pursuits and employments of mankind which all citizens may properly and lawfully follow as their inclination leads them, and as the law of supply and demand will allow." (1 Abbott U. S. R. 399, 1870.)

We have quoted thus fully from the various opinions in this famous case to show that it was always and on all sides

agreed that in certain matters of public interest, in certain enterprises of public importance, it was beyond question in the power of the legislature to make contracts which should be as valid and binding as any contracts can be.

In the case at bar it certainly was a matter of great public importance to provide for the lighting of the public places and private houses in a great city. In order to accomplish this result there must be a proper authorization to some person or corporation to use the highways of the city in laying the conduits.

These streets were under the control of the General Council of the City of Louisville to a certain extent only. But we submit that it was not within the ordinary powers of that body to allow this new user of the highways. In other words, the municipal authorities of a city can not, without express power, allow its highways to be used for the purpose of holding gas-mains for the distribution of gas. We state this on the analogy of the well-settled law to the effect that the municipality can not, without such express power, allow the highway to be used by even a street railway. (2 Dillon, Munic. Corp., §§ 715, 716; Milham v. Sharpe, 27 N. Y. 611.)

And here we desire to call attention to a mistake of fact made by the Court of Appeals of Kentucky in its opinion in this case.

Judge Hines said (P. R. 59):

"Even if it be conceded, which it is not, that appellant has no right to tear up the streets and lay down its pipes and mains without the consent of the city council obtained previous to the assertion of claim in opposition to the exclusive right insisted upon by appellee, it is clear that appellee has no such right to tear up the streets and lay down therein its pipes and mains, even with the consent of the city council, for the seventh section of its charter, granted in 1867, and which gives this right, is expressly repealed by the third section of the act of 1869, amendatory thereof. The language of the third section of the act of 1869, repealing the seventh section of the act of 1867, is plain, emphatic, and unequivocal, and leaves no room for speculation as to the intention of the legislature in the use of such language."

This grew out of a misapprehension which is sufficiently explained by the following statement, which we take from the petition for rehearing:

"The first point in the opinion delivered by Judge Hines which we desire to notice is the statement that the Louisville Gas Company has no right to tear up the streets of Louisville and lay down therein its pipes and mains, even with the consent of the city council, because the seventh section of its charter granted in 1867, and which gives such right, is expressly repealed by the third section of the act of 1869, amendatory thereof.

"This is an entire mistake, section 7 of the act of 1867 has never been repealed.

"For this error counsel on both sides are responsible.

"We should have called the attention of the court to the fact that there was an error committed by the printer of the Session Acts in numbering the sections of the charter of the 30th of January, 1867.

"This arose from treating the preamble of the act as a section, and numbering it section 1. The error thus committed was perpetuated throughout the entire act.

"The enrolled act, a copy of which we attach to this petition, corrects the error which crept into the printed act, and shows how the court was misled into stating that the privilege of opening the streets of Louisville, for the purpose of laying its mains and pipes granted to the Louisville Gas Company in the seventh section of the charter of 1867, was repealed by the third section of the act of the 22d of January, 1869. Section 7 of the printed act is section 6 of the enrolled bill, and section No. 7 of the enrolled bill is numbered section 8 in the bill as printed in the Session Acts. . . .

"What we have said above upon this subject will also serve to guard your Honors from falling into the mistake of supposing that that section of the charter of 1867 (section 4), which requires the company to make an extension of its mains and gas to Portland, etc., in two years after the act should take effect, was repealed by the second section of the amendatory act of 1869, which declares that so much of section 5 of the extended charter of the company as requires a profit of eight per cent on the cost of extension is thereby repealed, and requires such extension to be made whenever the public and private lights arising from said extension will pay seven per cent on the cost thereof. Section 5 of the enrolled act corresponds with section 6 of the act as printed in the Session Acts, and the section repealed and supplied by

the second section of the act of 1869 is section 6 in the printed act of 1867, and not section 5 thereof." (P. R., pp. 68 and 69.)

In the appendix to this brief will be found a copy of the enrolled bill.

Returning then to the argument, it will be observed that when the general council and the Louisville Gas Company had agreed upon such terms as were mutually advantageous, the legislature of Kentucky, at the request of both, embodied them in the amendatory charter of 1869. Of what substantial advantage these terms were to the city of Louisville and its citizens has been shown. Now, then, can the legislature under its police power abruptly sunder or put an end to such a contract?

The power of the legislature to grant exclusive privileges to corporations undertaking various kinds of public service has been fully recognized. "Such exclusive grants in favor of bridge, wharf, telegraph, and railroad companies have been sustained." (Pierce on Railroads, 454.) In the notes to this passage the authorities are collected.

The question of the power to make such exclusive grant has hardly, if ever, arisen except upon the endeavor on the part of the legislature to revoke it or in some way to curtail it. But hitherto, or rather since the Dartmouth College case, the attack has rather been made upon the original validity of the exclusive privilege, than rested for its force upon the power of subsequent hostile legislation against it.

There is not any where a more thorough discussion of this question or vindication of this doctrine than that contained in the opinion of this court in the Binghampton Bridge case (3 Wallace, 52). The exclusive privilege of erecting and maintaining a bridge was there sustained by this court against the right of the legislature to authorize the building of such a structure by another corporation.

The existence of these numerous cases upon the subject of the inviolability of such exclusive rights is in itself a pow-

erful argument against the doctrine now attempted to be maintained, namely, that all privileges granted to corporations engaging in work for the public benefit are within the police power, and subject to legislative recall. This would have been so easy a road out of the difficulty as to make unnecessary the many elaborate discussions in the books upon this subject. Moreover, there is another line of authorities which are equally inconsistent with any such view.

It has been held by many cases that the method by which such exclusive right can be recalled is by giving to the corporation just compensation, the privileges and the property connected therewith being condemned under the power of eminent domain. Thus, the leading case of the *Enfield Toll Bridge* is twice reported; once in 17 Conn. 40, and the other time in 17 Conn. 454. In the one case the exclusive right of the Bridge Company is upheld as against hostile legislation; and in the other the right to condemn the franchise under the power of eminent domain is asserted.

In *Metropolitan Street Railway Co.* v. *Chicago Railway Co.*, 87 Ill. 320, we find rather a curious application of this doctrine. For there a street railroad having under contract with the city the right to exclude all rivals from certain streets not occupied by it, this right was held subject to condemnation.

The doctrine we now speak of was sanctioned by this court in the case of the *West River Bridge* v. *Dicks, and others*, 6 Howard, 507, where it was held that the exclusive right to maintain and operate a bridge, and the bridge itself might be condemned by proper proceedings, due compensation being made to the corporation for the franchise and property. Now it is remarkable that there should exist any of these cases if under the police power the exclusive franchise could be so readily withdrawn.

But so fully are such rights protected that not even the power of eminent domain is unrestricted. It can not be exercised in a merely colorable way. Thus, Mr. Justice McLean, in *Bridge Company* v. *Dicks*, 6 Howard, 537, says:

"No State could resume a charter under the power of appropriation and carry on the functions of the corporation. A bank charter could not be taken and the business of the bank continued for public purposes. Nor could this bridge have been taken by the State and kept up by it as a toll bridge. This could not be called an appropriation of the property to public purposes. There would be no change in the use except the application of the profits, and this would not bring the act within the power. The power must not only be exercised *bona fide* by the State, but the property, not its profits, must be applied to the public use."

So, in Boston Water Power Co. v. Boston & Worcester Railroad Co., 23 Pickering, 393, Chief-Justice Shaw said:

"If it is suggested that, under this claim of power, the legislature might authorize a new turnpike, a canal, or railroad, on the same line with the former one to its whole extent, we think the proper answer is, that such a measure would be substantially and in fact, under whatever color or pretense, taking the franchise from one company and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain, and incompatible with the nature of legislative power. In that case the object would be to provide for the public the same public easement which is already provided for and secured to the public by the prior grant, and for which there could be no public exigency. Such a case, therefore, can not be presumed."

These authorities show in themselves that the legislature can take neither the franchises nor the property of a corporation without just compensation. The property can not be taken without just compensation under any circumstances, and the franchises are themselves secure unless they are granted subject to the power of appeal.

It is not claimed that corporations are outside of all exercise of the police power. They are subject to regulation in proper cases. Cooley (Con. Lim. 577) lays down the rule thus:

"The limit to the exercise of the police power in these cases must be this. The regulations must have reference to the comfort, safety, or health of society. They must not be

in conflict with any of the provisions of the charter; and they must not, under pretense of legislation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchises."

In that book will be found many illustrations of the doctrine. In the case at bar the Louisville Gas Company, having the exclusive right to lay its mains in all the highways of the city of Louisville, and to supply the city and its citizens with gas, it is idle to speak of an act which gives to another company exactly the same right to lay pipes and to supply gas for the public and private consumption as a police regulation. The absurdity of such a contention is too manifest to need any comment. The fact is, that the effort now made to establish the doctrine that all provisions which the legislature may make for the conduct of public works by corporations, under grants of power and privileges thereto, are within the police power, and therefore subject to recall by the legislature; or, to state it another way, the effort that is now being made to prove that one legislature can not, by grant to a corporation of the exclusive right to erect and maintain a public improvement, hamper future legislatures from violating the contract upon which such public improvement was thus erected, is only the old attack upon the Dartmouth College case, without even the assumption of a new garb. Without citing the many cases in this court which go to the refutation of this doctrine, we may be pardoned for giving in addition two complete statements of the proposition from the courts of the States.

In *Delaware Canal Co.* v. *Raritan Co.*, 16 *N. J. Equity*, 364, Chancellor Green in discussing the exclusive right claimed by the complainant says:

"But it is objected that the act of 1832 is null and void, inasmuch as it derogates from the power of subsequent legislatures, upon the familiar principle that acts of parliament derogatory from the power of subsequent parliaments bind

not. (1 Black. Com. 90.) The power of the legislature to make a contract is not denied. It is an inherent attribute of sovereignty. The Constitution does not deprive the legislature of the power of contracting, but only of violating its contracts. The prohibition is, that 'No State shall pass any law impairing the obligation of contracts.' Independent of this constitutional provision, any subsequent legislature would have as full power to annul the contract, or to pass a law inconsistent with it, as the legislature had to make it. It is the Constitution then, and not the contract that derogates from the power of subsequent legislatures. . . . The doctrine, as attempted to be applied by counsel, carried to its legitimate conclusion, would deprive the legislature of all power of disposing of public property. The sale of a part of the public domain, in one sense, derogates from the power of future legislatures. What has once been granted can not be granted again. And yet the power of the legislature, as well as parliament, to alienate the public domain, to convert arms of the sea, where the tide ebbs and flows, into arable land, to the utter destruction of the common rights of navigation and fishing, is well settled, and has been repeatedly exercised. So the legislature may grant a franchise of taking tolls, which are a branch of the prerogative upon ferries, bridges, or highways. If once granted, the same franchise can not be granted again. The legislature can not grant to another the right of taking tolls upon the defendant's road without making compensation. To some extent the grant of any franchise must in this sense be derogatory of the power of subsequent legislatures. But it is not contended that the legislature has no power of granting the franchise of taking tolls, or of granting any other property which the State may own. This was not contended in the case of the Charles River Bridge v. Warren Bridge, 11 Peters, 420, nor did the court so decide. What the majority of the court in that case did decide was, that where there was a grant of a franchise of a ferry without exclusive words, the legislature might lawfully establish another ferry to the detriment of the former. That the grant of the franchise, being a public grant, must be construed strictly, and that nothing would pass by implication. Where no exclusive privilege was expressly granted none would be presumed to exist. The extent of the principle as applicable to this case, fairly stated, is simply this, that the legislature can not divest itself of the power or the duty of providing necessary highways for public use. And the answer to the objection is, that they have not done so. The legislature have the same control over the franchises and other property of the complainants that they have over the

property of any other citizen. It is subject to the right of eminent domain. By virtue of that right, if the public necessity so requires, the exclusive franchise, as well as the other property of these complainants, may be taken and condemned for public use upon making just compensation. The legislature therefore have, in no proper sense, by granting the exclusive privileges to the complainants derogated from the power of subsequent legislatures to furnish highways. The only question is, whether just compensation shall be made to the complainants for their property, or whether it may be taken and appropriated, in disregard of the honor of the State and of the rights of the complainants."

In the opinion of the Chief-Justice in the same case (18 N. J. Equity, 564), it is said:

"It is true that there was one other topic which was somewhat pressed, but I do not deem it of sufficient weight to call for any extended discussion at my hands. This contention was to the effect that the legislature could not, legally, agree with the complainants not to permit, for a specified term, competition in their business, as such a compact was a derogation from the power of subsequent legislatures. This argument is not new; it has often been pressed upon the attention of the judicial tribunals, both state and national, but, it must be confessed, with indifferent success. The fact is, it would seem undeniable that the doctrine is an explicit denial of the right of a legislature to make a contract binding on future legislatures, for it is not easy to conceive any ordinary contract which will not, in some measure, restrict the freedom of action of those who are parties to it. Such a theory, therefore, is obviously inconsistent with that long line of adjudications which have their root in the case of Dartmouth College v. Woodward. But this objection needs no further notice, as it is most completely refuted in the learned opinion which was read in this case in the court of chancery."

The other authority to which we desire to refer is the opinion of Chief-Justice Shaw in the case of Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray, 33:

"But it is strongly urged that if the legislature intended to grant such exclusive right, and the terms of the whole act taken together will bear and require that construction, and they did grant such exclusive right, and did restrain succeed-

ing legislatures from making any grant or contract inconsistent with it, the provision itself was beyond the power of the legislature, and was void. We readily concede that, for general purposes of legislation, the legislature, rightly constituted, has full power to make laws, to repeal former laws, and of course the last legislative act is binding and necessarily repeals all prior acts which are repugnant. But in addition to the law-making power, the legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises; to stipulate for, purchase and obtain all such property, privileges, easements, and improvements as may be necessary or useful to the public; to bind the community by their own contracts therefor, and generally to regulate all public rights and interests. It is under this authority that lands are granted, either in fee or upon any other tenure; that the uses of navigable streams and waters are regulated; the right to build over navigable waters, to erect bridges, turnpikes, and railroads, and other similar rights and privileges, are granted and justified. Of the necessity and convenience of all roads and other public works and improvements, of their fitness, and the best mode of providing them, the established government of the State, acting by the legislature for the time being, must necessarily judge and determine. They must decide whether it is best to provide for them by funds from the public treasury, or to procure individuals to advance their own funds for the purpose, to be reimbursed by tolls; and to make just and adequate provisions incident to each. Supposing ferries or bridges are obviously necessary over a long and broad river; it is equally obvious that no public convenience will require them to be built parallel and close to each other; on the contrary, such erections would be an unnecessary waste of property. Would it not be for the legislature to decide within what stated and fixed distances from each other the public convenience would require them? If they were erected by funds drawn directly from the State, the legislature would plainly have power to determine such distances, and provide that no one should be built within the distances thus fixed. May they not, with a due regard to the public exigencies and public interests, do the same thing, when such public works are erected by individuals at the instance and procurement of the government for public use? Were it otherwise, and were all such grants and stipulations repealable by a subsequent legislature, because they are in the form of laws, then the unlimited power of the legislature to alter and change the laws, sometimes called, rather extravagantly, the omnipotence of parliament,

would be a source of weakness and not of strength. In making such grants and stipulations, no doubt great caution and foresight are requisite on the part of the legislature, a just estimate of the public benefit to be procured, and the cost at which it is to be obtained; and as great changes in the state of things may take place in the progress of time, a great increase of travel for instance on a given line, which changes can not be specifically foreseen, it is the part of wisdom to provide for this, either by limitation of time, reservation of a power to reduce tolls, should they so increase at the rates first fixed as to become excessive, or of the right to repurchase the franchise upon equitable terms, so that the contract shall not only be just and equal in the outset, but within reasonable limits continue to be so. In the charter of the Boston & Lowell Railroad Corporation, the government reserved the right both to regulate the tolls and to purchase the franchise upon terms fixed and making part of the contract. When such a contract has been made by the legislature upon considerations of an equivalent public benefit, and where the grantees have advanced their money to the public, upon the faith of it, the State is bound, by the plain principles of justice, faithfully to respect all the grants and rights thus created and vested by the contract."

"Such a power of regulating public rights is every where recognized as one distinguishable from that of legislation, a power incident and necessary to all well-regulated governments, and when rightfully exercised is within the constitutional power of the legislature and binding upon the government and the people."

In Fletcher v. Peck, 6 Cranch, 135, the court say:

"When then the law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law can not divest those rights."

So any lawful grant of privileges to others repugnant to those previously granted, which, if valid, would be a repeal by implication, is obnoxious to the same objection. That which can not be repealed in express terms can not be repealed by implication. By the enactment of laws repugnant to the provisions of the former act the same defect of power which invalidates the one has the same effect upon the other.

In the case at bar, the legislature of Kentucky being fully

informed upon that subject by the municipal council of the city of Louisville chose to provide for the lighting of the public places and the private houses in the city of Louisville; to charter one company and agree that it might have the exclusive privilege of performing this public service during the term of its existence. In consideration thereof the corporation not only went forward to lay out its money but agreed to continue so to do upon certain prescribed terms, and also agreed to furnish to the city and citizens light for public places and private dwellings, at what was on all sides conceded to be a reasonable compensation. Now surely under the principles which have been laid down by this court, and by all the courts that have had respect to the decisions of this court, it was within the power of the legislature to determine this question. It was within the power of the legislature to determine whether this public necessity for lights, public and private, could best be supplied by one agency, or more than one agency; whether it could best be undertaken by the public, or by some corporation which could be induced to undertake it upon being assured a reasonable compensation for its services. When, therefore, this particular corporation was thus selected and when the legislature of Kentucky in the solemn form of an enactment agreed that it might continue in existence for twenty years, and might, during that time exercise this right as an exclusive right; and that it would not deprive it of any of its rights or privileges except upon its own consent; and further agreed with the city of Louisville that it would not release the Louisville Gas Company from any of its obligations except upon the consent of the municipal council, it is difficult indeed to conceive how any just reason can be given for interfering with the contract thus solemnly entered into, and thus far fully performed.

X.

We come now to the point upon which the reversal of the judgment rendered in this case by the Louisville Chancery Court was based.

The Court of Appeals without division held that the charter of the Louisville Gas Company was subject to repeal and amendment under the provisions of the act of February 14, 1856, hereinbefore quoted at length, and that the exclusive privilege conferred by the fifth section of the act of 1869 was repealed by the act incorporating the Citizens Gas Light Company. We submit that no part of the charter of said Louisville Gas Company was subject to repeal or alteration by virtue of said act of 1856, because a contrary intent was plainly expressed in the sixth section of the said amendatory act of 1869, which declared:

"That no alteration or amendment to the charter of the (Louisville) Gas Company shall be made without the concurrence of the city council (of Louisville) and the directors of the Louisville Gas Company."

This amendment became a constituent part of the charter of 1869, just as if it had been originally incorporated into it. (New Jersey v. Yard, 95 U. S. R. 104; Louisville & Portland R. R. Co. v. Louisville City Railway Co., 2 Duvall, 275.)

The court will bear in mind that the act of 1869, amending the charter of the Louisville Gas Company, was the result of many consultations between the committees of the company and city council, touching the questions of purchasing the gas-works, rate to be charged private consumers for gas, extension of mains, and cost of gas to the city. Under the act of 1867, and at the time of the passage of the amendatory act of 1869, the company was authorized to charge for its services in taking care of, cleaning, repairing, lighting, and extinguishing the lamps, the average charge for such services in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, and for the gas furnished for lighting the

streets, the company was entitled to receive the actual cost thereof. It was authorized to charge private consumers the average price of gas in the cities first named. It was not required to make extensions (other than as was provided in the fourth section of the act) until the private and public lights required by the citizens would pay eight per cent on the cost of extension. Such being the case, and a modification and amendment of the charter upon these and perhaps some other points being desired by the city government, the committees of the two bodies agreed upon the provisions of said act of 1869, and made report of the result of their consultations to their respective bodies, which was approved by each. The city council was satisfied with and regarded the concessions made by said company upon the subject of extensions of mains and area of gas lighting, the limitation upon the price the city would in any event have to pay per lamp for gas for lighting the streets, the surrender of all charge for cleaning, taking care of, repairing, and lighting and extinguishing the street lamps, the graded rate for gas to private consumers, so that the net profits of the company should not exceed twelve per cent per annum on the par value of the stock; the dedication of two per cent annually of such profits to the extension of mains and pipes; the denial of the right to capitalize the same except at the end of every five years, and the agreement to invest the unused dividends belonging to the city and to hold the same in permanent trust, as the full equivalent of the exclusive privilege of manufacturing and vending gas to the city and citizens of Louisville; and the city council, in view of the advantages to be derived through said proposed amendment, was anxious to have it made permanent by being enacted into a law and made a part of the charter of the company.

The record shows that both parties sent a committee to the legislature for the purpose of having the matters agreed upon incorporated with and made a part of the charter of said company, which was promptly done, as is shown by the

amendment aforesaid. This action of the parties leaves no doubt as to their wishes. The introduction of the sixth section of said amendatory act was to secure the permanency of the charter as amended, and to prevent its amendment or alteration except both concurred. Without the legislative consent what they desired could not be accomplished. The passage of the act is the contract between the legislature and the company, that the charter of the latter should not be disturbed or the rights conferred changed, or altered, or taken away, without the concurrence of the parties asking the passage of the law.

And now we ask: Is it not manifest that the sixth section of the act was intended to prevent any alteration of the charter by succeeding legislatures, unless both the company and council concurred therein? Do not the words used plainly express an intention on the part of the legislature to restrain amendment thereof by the only body that could alter or amend it, unless the parties that asked for the legistion should ask for the repeal, alteration, or amendment thereof? Was it not for the interest of the city and citizens of Louisville, that the advantages gained to both, should be placed beyond repeal or alteration?

We know that neither the company or council could change or amend the charter of the former; therefore the interdiction against amendment or alteration thereof was addressed to and laid upon that body which alone could legislate, viz., the General Assembly of the Commonwealth of Kentucky.

Unless the sixth section of the act was intended to restrain the amendment or alteration of the charter by the legislature, except as provided therein, that section is without effect or meaning. Had it not been incorporated, there was an undoubted power under the act of February 14, 1856, to amend or alter the charter. If it was not intended to restrain the legislature and prevent the amendment thereof, why was it introduced? If the legislature intended to leave

its right of repeal or amendment of the charter as it existed, unquestionably, under the act of 1856, it certainly would not have introduced any provision on the subject, because it was unnecessary. Will any one argue that it was introduced into the act for the purpose of asserting or reserving the right to amend the charter, which independently thereof, and antecedently thereto, the legislature unquestionably possessed? No one will so contend.

Nor can we conceive (as suggested by the Court of Appeals) that the legislature adopted or deemed it necessary to adopt that section of said act in order to prevent one of the parties for applying for legislation unfavorable to the other. We do not believe that any such idea influenced the legislative action in question, or that any legislature ever proposed to pass a law declaring, or intending to declare, that one citizen should not ask for legislation at the hands of the legislative department of the State, unless he gave notice of such application to some other citizen. Why on earth should any legislature do so useless a thing, since in its discretion it may grant or refuse legislation, and is not bound to pass laws that may be applied for by one or any number of citizens? We must therefore seek a better reason for the introduction of the sixth section into the amendatory act of 1869 than that assigned by the highest court of the State of Kentucky.

There is but one intelligent reason at hand, and that is, that the legislature intended thereby to plainly assure the parties that the charter which had been made desirable and entirely satisfactory to the city council of Louisville, representing the local public and municipal government, and to the Gas Company, representing the stockholders thereof, should not be altered or amended without the concurrence of both.

With entire respect for the learned court that has put upon record the above mentioned reason, for the introduction of said sixth section into said act of 1869, we enter our dissent thereto. That section can not be reduced to the meager and

utterly unnecessary purpose ascribed to it. It is to receive consideration as well as the other sections, and be made to perform some duty or office, if possible. But the court by its interruption thereof, has shorn it of all office and effect, and made it a mere excrescence and deformity on the otherwise valuable and important sections of the act.

The plain and popular meaning of the language of the section is, that the legislature shall not amend the charter of the Gas Company without the concurrence of both the city council and Gas Company; and we are sure that the legislature intended that the words used in said section, should be so understood and construed. In the amended act are all the elements of a contract and compromise. In its composition there were grants, mutual covenants, and agreements, based upon good and valuable considerations. There were matters of disagreement, touching the interest of the city government, the Gas Company, and the local public, adjusted by conference and consultation of committees of the respective parties; some advantages relinquished; additional, and more onerous obligations assumed by the company; rates and charges for services and prices of gas to the public and private consumers fixed and settled; surplus profits appropriated in the interests of the local community, and an equivalent given for such surrenders, relinquishments, and additional obligations assumed by the Gas Company, in the exclusive privilege and immunity from legislative interference contained in the fifth and sixth sections of said act of January 22, 1869.

In view of this indisputable history of the origin of the amendment of 1869, can it be contended earnestly, or believed, that it was intended by either the legislature or city council or Gas Company, that the latter should be bound to said amendatory act forever, and the State not at all? Or, that the said sixth section was only introduced, as suggested by the lower court, to regulate the respective rights of the city

and the Gas Company, so that neither, without the consent of the other, could call upon the legislature to exercise its right of alteration or repeal; or that, notwithstanding the sixth section of the act expressly declaring that no alteration of the charter should be made except upon the condition therein expressed—the legislature might still, at its option, alter, amend, or repeal the charter of the company, and take away the exclusive right granted it by the fifth section of said act? Should we so construe the act we would unjustly reflect upon the good faith of the legislature. These suggestions find support in the reasoning of the court by Justice Miller in the case of New Jersey v. Yard, 95 U. S. 104.

The facts of the case are complicated and numerous. They can not be recited within any reasonable space. Any condensed statement of them would be unsatisfactory. We therefore invite the court to examine the case for themselves.

We ask in conclusion of this point, and of our argument in this case, is it not manifest that the lower court utterly misconceived the purpose and meaning of the sixth section of said act of January 22, 1869? And has it not, by its erroneous interpretation thereof, given effect to a statute of the State of Kentucky which impaired the contract between said State, the city government of Louisville, and the Louisville Gas Company, created by said act, and deprived the appellant in error of all of its benefits?

We respectfully submit that the judgment of the Court of Appeals of Kentucky was wrong, and violates the contract rights of the plaintiff in error.

JNO. K. GOODLOE,
Of Counsel for Plaintiff in Error.

GOODLOE & ROBERTS,
J. G. CARLISLE,
HARGIS & EASTIN,
ALEX. P. HUMPHREY,
Counsel.

APPENDIX.

CHAPTER 1179.

AN ACT TO EXTEND THE CHARTER OF THE LOUISVILLE GAS COMPANY.

Be it enacted by the General Assembly of the Commonwealth of Kentucky: That the following charter be granted to the present Louisville Gas Company, to take effect at the expiration of the present charter on the first day of January, 1869: *Provided*, The City of Louisville does not exercise its privilege to purchase the same in accordance with the terms set forth in Article 18 of the present charter. Condition of Charter.

SECTION 1. That a company shall be and the same is hereby incorporated, with a capital of fifteen hundred thousand dollars, to be divided into shares of fifty dollars each, to be owned by individuals, companies, and corporations; they and their successors and assigns shall be and they are hereby created a body politic and corporate, by the name and style of the Louisville Gas Company, and shall so continue for twenty years from the first day of January, 1869; and by that name and style, under the restrictions hereafter prescribed, shall be capable to contract and be contracted with, sue and be sued, plead, answer, and defend, in all courts and elsewhere, as natural persons; and may have and use a common seal, and change, alter, and renew the same at pleasure; and may ordain and put in execution such by-laws, rules, and regulations, for the good government of said company, and for the efficient management of its affairs and prudential concerns, as may be deemed expedient, not contrary to the Constitution or laws of this State or of the United States. Capital. Duration of Charter.

SEC. 2. That the capital of fifteen hundred thousand dollars shall consist, first, of the stock of the present Louisville Gas Company, on the 31st of December, 1868, at par value; secondly, of the contingent fund and undivided profits that the same company may own at the expiration of its present charter, said fund to be capitalized *pro rata* for the benefit of the present stockholders, except fractional parts of shares, which shall be paid in cash; and, thirdly, new stock may be issued and sold by the new company when required, to the extent of the capital stock; the sales to be made at public auction, after ten days' notice in the city papers. Capital—how made up.

Should such stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale of said stock.

Duties and privileges.

SEC. 3. That said company shall keep an office in the city of Louisville, and its business shall be to make and furnish gas to the city of Louisville, and residents thereof, and vend the same; and said company shall have the right to purchase and hold such real and personal property as may be necessary, proper, or convenient in the carrying on and transacting its said business.

Extension to Portland.

SEC. 4. The Gas Company shall, within two years after this charter takes effect, be required to extend the gas distribution to Portland, and lay down street mains along the Portland Avenue to the intersection of Third and Fulton streets, Portland; thence along Third Street to Commercial Street; thence north on Commercial Street to Water Street; thence down Water Street to Grove Street, including the erection of public lights.

Extension.

SEC. 5. The company may extend the main pipes for distributing the gas, when, in their judgment, it may seem fit; but shall not be bound to extend the same until the private and public lights required by the citizens will pay eight per cent profit on the cost of the extension; and whenever an extension is required, the company shall furnish the proper estimates; and when the sum required shall be subscribed, the company shall be bound to make the extension until their capital stock is absorbed in the gas-works and extensions.

Privileges of company in relation to laying pipe.

SEC. 6. That, to enable the company to construct, continue, and extend its gas-works in the city of Louisville, it is authorized to continue the use of the pipes and conductors which may have been laid down; and, with the consent of the City Council, to own and extend its pipes and conductors through the other streets and alleys of said city; and for that purpose to take up the pavements and to replace the same; and shall be responsible to the city for any damage which may arise therefrom, or any unreasonable delay in replacing the same; and said company shall be subject to the regulations of the city as to the streets and alleys, and to the same ordinances and penalties that individuals may be subject to: *Provided*, All extension of pipes and conductors shall be made with the consent of the General Council of the city.

City lamps, number, cost, etc.

SEC. 7. The Gas Company shall put lamp-posts, fixtures, etc., along the street mains as they are extended, at a distance apart of about two hundred feet, or as near that distance as the dimensions

of the square may admit, so as to make an equal distribution of the same; and whenever there are street mains on both sides of the streets, the lights are to be located so as to alternate, preserving the same distance, namely, about two hundred feet for the lamps on each side of the street. The Gas Company are to keep the lamps in order, to furnish gas, and light and extinguish the same, giving to each light an illuminating power of about twelve sperm candles; and the time of burning shall be from the close of twilight at evening until dawn of day in the morning, except on clear moonlight nights, or parts of nights, when the moon shines clear and bright, when the lights may be dispensed with, and shall charge and receive therefor from the city of Louisville only the actual cost thereof. These charges shall not exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, nor shall the price charged other consumers of gas be greater than the average price of gas charged such consumers in said cities.

Charge for gas to consumers.

SEC. 8. A gas inspector or inspectors shall be appointed, whose duty it shall be to examine into all supposed errors in the gas bills of consumers, and correct the same, when called upon by the consumer for that purpose. The manner of appointing and the remuneration of said inspector or inspectors is to be made in such a manner as the City Council of Louisville and the Gas Company may agree upon.

Appointment of inspectors.

SEC. 9. That if any person or persons shall willfully, by any means whatever, injure or destroy any part of the gas pipes or conductors, lamps, lamp-posts, burners, or any of their works, or fixtures, or machinery, all such persons shall be bound to the company for all damages sustained thereby, and may, furthermore, be liable, within two years after the commitment of the offense, and, upon conviction, shall be fined in any sum, at the discretion of the jury, not exceeding one thousand dollars, or by imprisonment in the city work-house, at hard labor, not exceeding five years; but this section shall not be held to change the law as to arson, or willfully burning the houses of the company: *Provided*, That so much of this section as imposes imprisonment shall not apply to infants.

Penalties for disturbing the Works.

SEC. 10. The stockholders, exclusive of the city of Louisville, may elect five (5) directors, and the General Council of Louisville, four (4) other directors, and these nine directors shall choose from among themselves a president; and to said directors shall be intrusted the real and personal estate, business, property, funds, and

Election of Directors and choice of President.

financial concerns of said company, and the administration of its affairs. All the directors shall be stockholders to the amount of twenty shares each, in their own right, and, after their first election, shall have been stockholders not less than three months before the election at which they are chosen. They shall serve for one year, and until their successors are chosen; and after the first election there shall be an annual election on the first Monday of January in each year, of which notice shall be given for ten days in the newspapers printed in Louisville; and the City Council shall, at their first regular meeting after the first Monday in January, elect the four directors on the part of the city. The president and directors shall fill all vacancies that may arise in their body from death, resignation, removal from the city, or the failure to meet their engagements to the company with promptness; and it shall be the duty of the other directors to declare the seat of a director vacant for that cause, or for a removal from the city. This, however, excepts those vacancies occurring among the directors appointed by the city, which vacancies are to be filled by the General Council of the city. That each share of stock in this company shall entitle the owner to one vote; and no one individual, company, or corporation, other than the city of Louisville, shall hold more than two thousand shares of the stock, either directly or indirectly; and if any one shall purchase and hold more, except the city, he shall forfeit his dividends on such excess of stock to the Gas Company.

Annual election of Directors.

Filling vacancies in Board.

Number of votes, amount of stock, and forfeiture of same.

SEC. 11. That certificates of stock shall be issued to the holders thereof whenever the same shall be paid for, and stock in this company shall be considered and pass as personal estate, and shall be transferable on the books of the company, in such manner as the stockholders, or president and directors, by their by-laws, prescribe; but no stock shall be transferable until all the debts and demands of the company are discharged; and for all debts and demands the company shall have a lien on the stock. That, on the second Monday in July and January in each year, the company shall make a statement of the affairs of the company and furnish the same to the stockholders and to the City Council, at which time the semi-annual dividend shall be declared.

Stock made personal estate — how transferred.

Two annual statements of the affairs of the company.

SEC. 12 That the president and directors shall keep a record of their proceedings, which they shall produce to the stockholders, at the regular or called meeting, and to a committee of the General Council, at any time during the business hours of the day, for examination or inspection.

Record of proceedings.

Penalties for misconduct of officers.

SEC. 13. That if any officer of this company shall, without the authority of the president and directors, appropriate any of the funds of the corporation to his own use, or that of any other person, shall willfully fail to make correct returns, or shall knowingly make false returns on the books of the company, with intent to cheat or defraud the corporation or any person, or to hide or conceal any improper appropriation of the funds of the corporation, the officers so offending shall be deemed guilty of felony, and, upon conviction thereof, be sentenced to confinement in the jail and penitentiary of this State for a period not less than two nor more than twenty years.

Compensation.

SEC. 14. That the directors shall allow to the president reasonable compensation for his services; but no compensation shall be allowed to a director, except by the order of the stockholders; and if the president or any of the directors shall knowingly diminish the capital stock by dividends or otherwise, they shall be responsible to the stockholders for the deficiency thus created.

Report and forfeiture to the State.

SEC. 15. Reports of the finances and affairs of the company may be required by the legislature, and the legislature shall have the right by its committees, to investigate the condition of the company; and any violation of the essential provisions of the charter shall cause forfeiture; but no forfeiture shall prevent the corporation from collecting its debts, and enforcing its contracts, and disposing of its effects.

Jurisdiction for forfeitures.

SEC. 16. That the Louisville Chancery Court shall have jurisdiction to hear and determine alleged forfeiture of this charter on complaint of any stockholder or State of Kentucky.

State tax.

SEC. 17. That the stock in the hands of the stockholders is exempt from all State tax, and, in lieu thereof, the State imposes a tax on the capital stock paid in of fifty cents on the hundred dollars; said tax to be collected from the Gas Company, and, when paid, to exempt the property and effects of the company from any additional tax.

City may purchase the Works.

SEC. 18. The city of Louisville, if it so elect, may purchase the gas-works at the termination of this charter, at a fair estimation of what said works are worth at that time: *Provided*, That the city shall notify the company of said election on her part at least one year before the termination of this charter; the value of the works to be ascertained by two competent gas engineers selected, one by each of the parties, and, in case of their disagreeing, by an umpire, whom they may select; the proceeds of which sale is to be divided *pro rata* among the stockholders, including the city of Louisville.

SEC. 19. This charter is to be valid and in full force when accepted by those who hold the majority of the shares of stock in the present Gas Company; and the new company shall become successors to and owners of all real estate and other property belonging to old company.

Approved January 30, 1867.

CHAPTER 1643.

AN ACT TO AMEND AN ACT TO EXTEND THE CHARTER OF THE LOUISVILLE GAS COMPANY, APPROVED JANUARY 30, 1867.

Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the fourth section of said act be and it is hereby amended by inserting the word "extent" after the word "effect" in said section.

Approved March 2, 1867.

Office Supreme Court U. S.
FILED.
OCT 24 1885
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

THE LOUISVILLE GAS CO., Plaintiff in Error.

vs.

THE CITIZENS' GAS LIGHT COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

Thomas F. HARGIS & EASTIN,
Of Counsel for Plaintiff in Error.

GOODLOE & ROBERTS,
JOHN G. CARLISLE,
} Counsel.

THE W. E. RILEY PRINTING CO., LOU., KY.

Supreme Court of the United States.

THE LOUISVILLE GAS CO., Plaintiff in Error.

vs.

THE CITIZENS' GAS LIGHT COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error, the Louisville Gas Company, was granted by its charter and for many years exercised the exclusive privilege of manufacturing and selling coal gas in the city of Louisville, Kentucky.

In 1872, the Citizens' Gas Light Company, having been chartered by the Legislature, assailed this exclusive right, and commenced suit against the plaintiff in error in the Louisville Chancery Court by bill, exhibiting its charter under which the right to make and sell gas in said city was asserted by it, and asked an injunction restraining and enjoining the plaintiff in error from further asserting claim to such exclusive privilege.

Upon the pleadings and exhibits, no evidence being heard, and the only issue raised being a question of law, the Chancellor dismissed the bill of the Citizens' Gas Light Company and upheld the claim of the plaintiff in error to the exclusive privilege asserted by it.

From that judgment the Citizens' Gas Light Company prosecuted an appeal to the Court of Appeals of Kentucky, where the judgment of the Chancellor was reversed and the case remanded to the Louisville Chancery Court with directions to grant practically the relief prayed by the Citizens' Gas Light Company. The plaintiff in error sued out this writ of error to the judgment of the Court of Appeals of Kentucky, and now prays a reversal of that judgment.

ERRORS ASSIGNED.

First. The Court of Appeals of Kentucky erred in perpetually enjoining and restraining the plaintiff in error from claiming and exercising the exclusive right to manufacture and supply gas to the city of Louisville and citizens of Louisville; and depriving the plaintiff in error of the benefit of the contract made between it and the State of Kentucky, evidenced by the act of 22d of January, 1869 *infra*.

Second. It was error of said Court of Appeals to the prejudice of plaintiff in error to adjudge that the charter of the plaintiff in error and the 5th section thereof were subject to amendment, alteration and repeal by virtue of the provisions of the 8th section of chapter 68, General Statutes of Kentucky, being the act of 14th February, 1856, which declared that:

> All charters or grants of, or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the Legislature unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

And the judgment based upon such construction of said act, is prejudicial to the rights of the plaintiff in error granted by its said charter, and impairs the obligation of the contract

for an exclusive privilege to vend gas to the city and citizens of Louisville, therein made with the plaintiff in error and expressly set out in said 5th section of the amended charter of plaintiff in error approved January 22, 1869.

Third. It is was error of said Court of Appeals prejudicial to the plaintiff in error to adjudge that the act of the Legislature of Kentucky of March 21st, 1872, repealed the 5th section of the amended charter granted plaintiff in error by the Legislature of Kentucky January 22nd, 1869.

STATUTES INVOLVED AND ARGUMENT.

The plaintiff in error, the Louisville Gas Company, was incorporated by the Kentucky Legislature in the year 1838.

The company was to continue until the 31st of December, 1868.

On 30th January, 1867, the Legislature passed "an act to extend the charter of the Louisville Gas Company," to take effect on the 1st day of January, 1869, or at the moment, in legal contemplation, the charter of 1838 should expire.

Twenty-one days after the act of 1867 took effect, and on the 22nd of January, 1869, another act was passed, entitled "An Act to amend" the above mentioned act of 1867.

The amended charter of 22nd January, 1869, reads as follows:

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO EXTEND THE CHARTER OF THE LOUISVILLE GAS COMPANY." APPROVED JANUARY 30, 1867.

WHEREAS, The city of Louisville and stockholders of the old Louisville Gas Company have accepted the said extended charter, and have agreed to certain amendments thereof, and desire that they may become a part of said extended charter:

Be it enacted by the General Assembly of the Commonwealth of Kentucky: Sec. 1. That any person who may be entitled to a fract onal share of stock under the provisions of section second (2d)

of said extended charter, may have his or her election either to take the same in cash at par, or have issued a whole share by paying the difference of par value of the fractional share and a whole one.

Sec. 2. That the Gas Company shall be bound to extend its main pipes whenever the public and private lights immediately arising from said extension will pay seven [7] per cent. profit on the cost thereof; and so much of the fifth [5th] section of said extended charter as requires a profit of eight [8] per cent on the cost of an extension is hereby repealed.

Sec. 3. That the Gas Company *shall put lamps-posts, fixtures, etc.*, along the *street mains* as they are extended, at a distance apart of about two hundred feet, or as near that distance as the dimensions of the squares may admit, so as to make an equal distribution of the same; and whenever there are street mains on both sides of the streets, the lights are to be located so as to alternate, preserving the same distance, namely, about two hundred feet for the lamps on each side of the street. The Gas Company are to keep *the lamps in order, to furnish gas, and light and extinguish the same*, giving to each light an illuminating power of about twelve sperm candles; and the time of burning shall be from the close of twilight at evening until dawn of day in the morning, except in clear, moonlight nights, when the light may be dispensed with; and said public lights shall be furnished to the city at actual cost; but in no event to exceed thirty-five dollars [$35.00] per lamp; and the charge for gas to private consumers shall be so graded as that the company's profits shall not exceed twelve per cent. per annum on the par value of the stock, ten [10] per cent. of which may be drawn by the stockholders in semi-annual dividends, and the other two per cent. to be laid out for extensions, and not to be capitalized except at the end of every five years. Section seven [7] of said extended charter is hereby repealed.

Sec. 4. That the stock and other interest the city has, or may have, in the Gas Works, shall not be disposed of, but the dividends arising therefrom, shall, as far as necessary, *be applied to paying for the public lights of the city;* and all investments of unused dividends belonging to the city shall be made by the directors of the Gas Company as trustee, with the concurrence and advice of the City Council, and held as a permanent trust during the continuation of this charter.

Sec. 5. That said Gas Company shall have the exclusive privi-

lege of erecting and establishing gas works in the city of Louisville during the continuation of this charter, and of vending coal gas lights, and supplying the city and citizens with gas by means of public works: *Provided*, however, this shall not interfere with the right of any one to erect, or cause to be erected, gas works on their own premises, for supplying themselves with light.

Sec. 6. That no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the City Council and the directors of the Gas Company.

Sec. 7. This act shall take effect from its passage.

Approved January 22, 1869.

The act of 1838 and that of January 22, 1869, granted to the Louisville Gas Company the *exclusive privilege* of making and selling coal gas within the limits of the city of Louisville, except as to those who should make gas for their own consumption.

Notwithstanding the express grant of the exclusive privilege mentioned, its long enjoyment by the Louisville Gas Company, and the performance by the company of all the conditions imposed by the grant, the legislature in violation of its terms, in disregard of the privileges conferred by it, and without the consent of the plaintiff in error, passed an

ACT 21ST MARCH, 1872,

incorporating the Citizens' Gas Light Company by the 1st section of which it is provided: "That" certain persons named "and other associates, successors and assigns are hereby created a body corporate and politic by the name of 'The Citizens' Gas Light Company of Louisville', for the purpose of making, selling and distributing gas for the purpose of lighting the buildings, public and private, in the City of Louisville and its adjoining territories." * * * (For the whole act see record top page 13.) Whether this act constitutionally abrogates the exclusive privileges granted by the act of 22 January, 1869, to the plaintiff in error is the ultimate question to be determined.

These several acts of the Legislature should be read and

construed together, in order to understand the question at issue in this case; whether the Louisville Gas Company can, without interruption, exercise the exclusive privileges above mentioned, or the Legislature take back its grant regardless of the injury it may inflict upon the previously vested rights of the company.

The extension act of 1867 by section (7) required the company to put lamp posts and fixtures along the streets of Louisville; to keep the lamps in order; to furnish gas for and light and extinguish them, and to charge the city only the actual cost therefor.

The city, owning about one-half of the capital stock of the Louisville Gas Company, came to an agreement with the stockholders in the company as to certain amendments becoming a part of the act of 1867, which was thereupon accepted, and an application immediately made to the Legislature to grant said amendments, which were granted on the 22d of January, 1869. By the express terms of the act of 22d January, 1869, a new contract was set forth for the acceptance or rejection of the company. That act, with its privileges and conditions, was accepted by the company. These privileges and conditions were materially different from those of the act of 1867, for which they were substituted. The material changes embodied in the act of 22d January, 1869, were these: Section 7 of the act of 1867 was repealed and the duties it imposed extended and more specifically stated; the company was bound to extend its mains and pipes wherever the lights would pay *seven* instead of *eight* per cent. profit; the price of lamps for the city was limited to $35 in lieu of *actual* cost, and the price to private consumers was confined to the production of a profit of twelve per cent., instead of the prices paid in Philadelphia, Baltimore and other cities.

Under the act of 1867, whose privileges and advantages the company surrendered to accept the act of 22d January, 1869, the company was not bound to extend its mains unless *eight* per cent. profit could be made; it was permitted to charge

the actual cost per lamp to the city, although it might exceed $35; and to exact the average charges for similar work or service in the cities of Philadelphia, &c., though they might yield more than twelve per cent. profit, and the company was also permitted to declare dividends of more than ten per cent. to which the act of 22d January, 1869, limited it.

Thus added burdens were placed upon the Louisville Gas Company, expensive improvements with reduced profits therefor were required; limitations were placed upon prices for lights which it was bound to furnish the city for public purposes; and the profits upon private consumption were restricted and the former standard of prices was altered and curtailed.

These additional and expensive conditions were added to the terms of the act of 1867 by the provisions of the act of 22d January, 1869, before large investments could have been made or much work done by the company under the act of 1867.

The company accepted the conditions of the Act of 22d January, 1869, imposing increased liabilities and duties upon it, on the faith of the undertaking and promise of the Legislature that the obligation on its part should not be violated. That obligation and promise was this: That the Louisville Gas Company should have and enjoy *the exclusive right and privilege of making and selling coal gas for twenty years, within the city limits of Louisville*, provided all the terms of the Act of January 22, 1869, which granted the exclusive privilege, were accepted. Now the Act of 22d January, 1869, with all of its terms, both of burden and benefit, was accepted, and in order to enjoy the exclusive privilege it granted, continuous investments of money, material, and property in large quantities have been made, labor and work done, and large liabilities incurred by the company, trusting to the promise of the Legislature that the exclusive privilege from which alone the company expected remuneration would not be taken from it without its consent. By comparison, it is seen that the Louisville Gas Company surrendered many val-

uable rights and privileges which it had just begun to enjoy under the Act of 1867, and lost them absolutely by accepting the terms of the new contract between it and the Legislature as evidenced by the Act of 22d January, 1869, section 5, of which expressly grants the exclusive privilege. There can be no doubt but that all this legislation, subsequent amendment, and acceptance, and the consequent investment of capital, labor, and property by the Louisville Gas Company constituted a contract, based upon a valuable consideration. Whether that contract is in violation of the 1st. section of article 13, called the bill of rights of the Kentucky constitution, and whether, if such a contract be forbidden by that section, that section itself is not in conflict with the constitution of the United States, which declares that "no state shall pass *any* law impairing the obligation of contracts," we leave to be discussed by our learned co-adjutors. Our argument shall be directed against the position taken in this case by half of the judges of the Court of Appeals of Kentucky, who held that the Act of 22d January, 1869, is not violative of the first section of the bill of rights of the constitution of Kentucky, because it is a contract in consideration of public services or value, but also held that it is within the operation of the Act of 1856. We hold that if the Act of 22d January, 1869, constitutes a lawful contract then neither a state statute nor a state constitution can authorize its impairment. But, before we proceed further, we call the attention of the Court to section 12, article 2, chapter 28, General Statutes of Kentucky, Title: "Courts," relative to the Court of Appeals, which provides that: "If the court is equally divided in the decision of a cause, the judgment or order of the inferior court is to stand affirmed."

The judgment of the inferior court was in favor of the plaintiff in error, the Louisville Gas Company, and upon an equal division of the Court of Appeals that judgment was, by the statute quoted, required to be affirmed. An equal number of the judges of the Court of Appeals agreed with the judgment of the inferior court, on the material and governing question in the case, but erroneously held, as we think, that

the Charter or Act of January 22, 1869, was subject to repeal under the above mentioned Statute of 1856. Now, if their position be correct, that the charter constituted a contract about a lawful subject matter, based on a valuable consideration, between competent parties who have acted upon it, then there can be no constitutional power to embrace such a contract within the Statute of 1856, and the presumption is, that the legislature never intended to do so.

And it is clear from the *proviso* of that statute it was not intended to apply to contracts under which rights are vested, for it expressly excepts such from its operation. As embraced in the General Statutes of Kentucky, chapter 68, section 8, it reads:

"All charters and grants of, or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed. *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This *proviso* is of choice words, and draws careful distinction between "*privileges and franchises*" and "other rights previously vested." What does the proviso mean? In response to this inquiry we say the words "privileges and franchises" are used in their general sense and mean, in this statute, naked privileges and franchises—the abstract powers and privileges embraced in and conferred by the charter—and have no reference whatever to privileges and franchises which have been accepted and acted on, and by authority of which "other rights" have been vested.

Whilst the Legislature may repeal or amend any charter and abrogate or qualify privileges and franchises *before* other rights have become vested, yet it cannot alter or repeal privileges and franchises *after* other rights have been vested under the authority and by the power of those privileges and franchises themselves, and on the belief, trust, and faith that they

would not be repealed if by doing so such previously vested rights would be impaired. The saving language of the *proviso* is very strong and general. It says *no amendment or repeal*, of any kind whatsoever, whether of privileges or franchises, of forms or substance, *shall impair other rights* previously vested—that is, vested before the repealing act shall be adopted. If no amendment or repeal can be adopted which will impair other rights, then it follows, "as night the day," that "privileges" cannot be repealed, if by repealing them other rights, vested on the faith of their grant and possession, will thereby be impaired. If the "other rights" be rights of property, or, as Sir William Blackstone says, "rights of things," and are risked and vested to secure the enjoyment of the privilege, whether that privilege be exclusive or inclusive, then it can not be repealed so as to impair such "other rights," unless it was unconstitutional to grant the privilege *in limine* or the privilege belonged to that class of revocable legislation, such as the privilege of gaming, &c. In support of these views we may appeal to practical reason. For if privileges and franchises can be amended or repealed *after* other rights have been vested, the proviso of the statute is a delusion and a snare, and vested rights may be swept away without restraint by the use of the general reserved power to alter or amend charters. Can the Legislature, within the exercise of legislative power, make a contract to grant a privilege and grant it as a part of the contract, then wait until the person, with whom it contracts, has invested money and property, consumed time and done great labor to make its granted privilege valuable, and after that privilege has thus been rendered valuable and remunerative, cut short its enjoyment, destroy the foundation and hope of these vested rights of property? Can the Legislature, we ask, do all this and yet say the destroying act is no impairment of those vested rights, those "other rights" indissolubly connected with the exclusive privilege?

It has always been the law that the legislature could repeal or amend charters, if by doing so the obligation of contracts was not thereby impaired, and vested rights in property

or values not thereby destroyed. The *proviso* to the statute simply declares what has been the law of this country since the ratification of the Constitution of the United States. Other rights of property vested previous to the attempt to amend or repeal the law on the faith of which the investment was made, are protected by the proviso and by the Constitution of the United States. It is true that the statute of 1856 may be treated as within the knowledge of the person receiving a legislative grant, but the idea cannot be entertained for one moment that the statute means to those affected by it that the legislature reserved the right to do as it pleased even unto the destruction of all right and opportunity for remuneration from investments of money, skill and property, by repealing the very privilege on the faith of whose enjoyment such investments are made and from which alone such remuneration can possibly be expected, received, or enjoyed.

In the case of the city of Covington vs. Covington and Cincinnati Bridge Company, 10th Bush 76, the court said: "It is settled by an unbroken chain of authority that the charter of a private corporation may vest such rights in the corporators and stockholders that no subsequent legislation can impair or diminish."

Again in the case of the Louisville, Cincinnati and Lexington R. R. Company vs. the Comonwealth, 10th Bush, 47-48, the court was more explicit, saying: "The legislature may create corporations whereby certain liabilities and duties are assumed by the latter, and in consideration of which rights and privileges are granted that no legislation without the consent of the parties interested can impair or diminish. In such cases 'the expectation of benefit to the public is the moving consideration on the one side, and that of expected remuneration for the expenditure on the other.'"

These decisions were rendered long after the passage of the Act of 1856, and are direct expositions of its true meaning. And they clearly lay down the doctrine which protects the rights of the Louisville Gas Company from legislative invasion.

These rights were vested under the privileges and franchises embraced in the amended charter of January 22, 1869. In pursuance of the contract it contains, the Louisville Gas Company assumed the most onerous liabilities and responsible duties in consideration of the exclusive right and privilege therein granted to it, of making and vending coal gas in the city of Louisville for the limited period of twenty years.

The moving consideration on the part of the Legislature, from which it expected benefit to the public was; First, that by granting this charter with that privilege in it, a responsible company was induced to bind itself for twenty years to furnish lights, at cost, and possibly less, to the public streets and offices of a municipality whose government and police conduct are absolutely subject to the legislative will; Second, that the Legislature anticipating the growth of the city and its future demand for "more light," both public and private, bargained with the Company to supply that demand by extending its mains whenever the public and private lights would yield seven per cent. profit—thus securing in advance a future reduction in the price of gas of one eighth less than that to which the Louisville Gas Company would have been entitled under the extension act of 1867; Third, that by granting the amended charter of 22d January 1869, it secured gas for the municipality of Louisville, at less than cost if that should exceed $35 per lamp; Fourth, and in addition to these benefits the Legislature placed the limit of twelve per cent profit on sales to the citizens of the municipality for whose good order and general welfare the legislature is responsible.

These public benefits and public advantages were secured from the Louisville Gas Company by the terms and acceptance of the act of 22d January 1869. They were required by that act as necessary conditions to the grant of the exclusive privileges.

But these were not the only conditions entering into the valuable consideration for the grant of this exclusive privilege. The Legislature exacted of the Louisville Gas Company a

surrender of its privileges and of the advantageous rates profits and dividends allowed under the act of 1867, which act was much more favorable in these respects than the act of 22d January, 1869. To illustrate: At the same time that the exclusive privilege of making and selling gas was granted as a component condition thereof, the Louisville Gas Company was required, and in order to the enjoyment of this exclusive privilege, it was compelled to agree to furnish gas for public lights at cost and if that exceeded $35 per lamp then at less than cost; to lay mains and supply gas to the increasing population of the city at seven instead of eight per cent. profit; to limit its profits on private consumption to twelve per cent., and to confine its dividends to ten per cent.

In consideration of these benefits and advantages to public and private consumers; of these concessions and assumed burdens, the Legislature solemnly granted to the Louisville Gas Company the exclusive privilege of making and vending coal gas within the city of Louisville for a limited period. From that exclusive privilege and that alone, the company expects remuneration for the obligations it assumed, the concessions it made, the money it has spent, the time it has consumed, the labor it has done and the property it has put to the hazard in complying with its part of the contract made with the Legislature and evidenced by the terms of the act of 22d January, 1869. We, therefore, contend that this charter is not within the operation of the statute of 1856.

Half of the judges of the Court of Appeals held that "The municipality of the city of Louisville, being a part of the state government, the necessity for gas light upon its streets and in its public buildings is almost as essential as the streets that are lighted by it. It is a public necessity, and when a contract is made to supply this public necessity with gas for a limited and reasonable period and that does not by its terms create what is termed a monopoly at the common law, the contract is binding." According to this view of the case the grant to the Gas Company, in order not to be binding as a contract, must be shown to be "a monopoly at the common law."

Their conclusion was that the grant of the exclusive privilege to the Louisville Gas Company was not in violation of section 1 of the Kentucky Bill of Rights, and not a monopoly at the common law, but that it was subject to repeal by reason of the statute of 1856. If their first two positions be correct, that this grant is neither a monopoly nor within the terms of the Kentucky Bill of Rights, then the grant is clearly a lawful contract within the legislative power, and if a contract, upon which the parties to it acted and under which rights of property were vested before its repeal was attempted, its obligation is protected by the constitution of the United States, which is superior to any statute or constitutional provision of any state that authorizes or permits the obligation of contracts to be impaired. A reversal is asked.

Very respectfully,

Thomas F. HARGIS & EASTIN,
Of Counsel for Plaintiff in Error.

GOODLOE & ROBERTS, }
JOHN G. CARLISLE, } Counsel.

Office Supreme Court U. S.
FILED
OCT 26 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1885.

No. 809.

THE LOUISVILLE GAS LIGHT CO.,

Plaintiff in Error,

vs.

THE CITIZENS' GAS LIGHT CO.,

Defendant in Error.

In Error to the Court of Appeals of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

J. G. CARLISLE,
Of Counsel for Pl'ff. in Error.

GOODLOE & ROBERTS,
HARGIS & EASTIN,
Counsel.

Commonwealth Print, Covington.

Supreme Court of the United States.

October Term, 1885.

No. 809.

THE LOUISVILLE GAS LIGHT CO.,

Plaintiff in Error,

vs.

THE CITIZENS' GAS LIGHT CO.,

Defendant in Error.

In Error to the Court of Appeals of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

In 1838 the Legislature of Kentucky incorporated the Louisville Gas and Water Company, with authority to erect gas and water works, and supply the city and its inhabitants with gas and water. Afterwards the name of the corporation was changed to the "Louisville Gas Company," and the

charter was so amended as to confine the business to the manufacture and sale of gas. The act of incorporation was to expire thirty years from the first day of January, 1839, and power was conferred upon the City of Louisville to purchase the property of the company at the termination of that period.

Under this act the company was at once organized, and for thirty years supplied the city and its inhabitants with gas for illuminating purposes. On the 30th day of January, 1867, about two years before the date fixed for the expiration of the original charter, an act was passed and approved, entitled "an act to extend the charter of the Louisville Gas Company," the first section of which provided that "the following charter be granted to the present Louisville Gas Company, to take effect at the expiration of the present charter, on the first day of January, 1869, provided the City of Louisville does not exercise the privilege to purchase the same in accordance with terms set forth in article 18 of the present charter."

By the second section it was provided that a company should be, and was thereby incorporated with a capital of $1,500,000, to be divided into shares of $50 each, to be owned by individual companies and corporations, and that they and their successors and assigns should be, and were thereby created a body politic and corporate by the name of the Louisville Gas Company, and should so continue for twenty years from January 1, 1869.

By the third section it was provided that the capital stock of $1,500,000 should consist, first, of the stock of the present Louisville Gas Company on the 31st of December, 1868, at par value; secondly, of the contingent fund and undivided profits that the company may own at the expiration of the present charter, said fund to be capitalized *pro rata* for the benefit of the present stockholders, except fractional shares, which shall be paid in cash; and thirdly, new stock may be issued and sold by the new company when required, to the extent of the capital stock, the sales to be made at public auction, after ten days' notice in the city papers; should said stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale of said stock.

By the fourth section it was provided that the business of said company should be to make and furnish gas to the City of Louisville and residents thereof, and vend the same.

By the fifth section it was provided that the Gas Company should, within two years after said charter took effect, be required to extend the gas distribution to Portland, and lay down street mains through certain named streets in that part of the city, including the erection of street lights.

By section six it was provided that said company should be bound to extend its street mains whenever the private and public lights would pay 8 per cent. on the cost of such exten-

sion, until its whole capital should be absorbed in the gas works and extensions.

By the seventh section it was authorized to continue the use of the pipes and conductors which had been laid down, and with the consent of the City Council, to extend the pipes and conductors through the other streets and alleys of said city.

By the eighth section it was provided that said company should put up gas lamps at certain distances apart on the streets where there were mains, and supply the same with gas and light and extinguish the same, and charge and receive therefor from the City of Louisville only the actual cost thereof, which charges were not to exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago and St. Louis, and that the price charged other consumers of gas should not be greater than the average price of gas charged such consumers in said cities.

By section eleven it was provided that the stockholders, exclusive of the City of Louisville, should elect five directors and the General Council of said city four directors.

By section nineteen it was provided that the City of Louisville, if it so elected, might purchase the gas works at the termination of this charter, at a fair estimation of what said works should then be worth.

By the twentieth section it was provided that this charter shall be valid and in full force when accepted by those who

hold the majority of the shares of stock in the present Gas Company, and the new company shall become successors to, and owners of, all real estate and other property belonging to the old company.

In December, 1868, the General Council of the city by resolution declined to avail itself of the right to purchase the property of the old company. But inasmuch as the city then held a large amount of the stock and was otherwise interested in any new organization that might be effected, a committee was appointed to confer with the Gas Company in relation to proposed amendments to its charter. (Record pp. 33-34). The result of this conference was an agreement between the city and the Gas Company that application should be made to the Legislature for the enactment of certain amendments, which will be found substantially set out in the proceedings. (Record 34–38).

In accordance with this joint request of the city and company, an amendatory act was passed on the 22nd day of January, 1869, containing the provisions agreed upon.

The second section of this act provided that the Gas Company should be bound to extend its main pipes, whenever the income from the public and private lights immediately arising from said extension should pay seven (7) per cent. profit on the cost thereof, and so much of the fifth section of the extended charter as required a profit of 8 per cent. on the cost of an extension, was thereby repealed.

And it provided by its third section that the Gas Company should put lamp-posts along the street mains at certain distances, and furnish gas, light and extinguish the same, and that said public lights should be furnished the city at actual cost, but in no event to exceed $35 per lamp, and the charge for gas to private consumers should be so graded as that the company's profits should not exceed twelve per cent. per annum on the par value of the stock, ten per cent. of which might be drawn by the stockholders in semi-annual dividends, and the other two per cent. to be laid out for extensions, and not to be capitalized except at the end of every five years; and that section seven of said extended charter be repealed.

By the fourth section a certain provision was made in reference to the stock of the city.

By the fifth section it was provided that said Gas Company should have the exclusive privilege of erecting and establishing gas-works in the city of Louisville, during the continuation of this charter, and of vending coal-gas lights, and supplying the city and citizens with gas, by means of public works; provided, however, this shall not interfere with the right of any one to erect or cause to be erected gas-works on their own premises for supplying themselves with light.

The sixth section reads as follows:

"That no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the City Council and the Directors of the Gas Company."

These acts were duly accepted by the stockholders of the original company, and the new organization proceeded thereafter to manufacture and furnish gas upon the terms and conditions prescribed, and has at all times complied with the requirements of the law.

When this legislation was enacted, the Constitution of Kentucky contained the following provisions:

"No law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in the title."—(Sec. 37, Art. 2).

"That all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services."—(Sec. 1, Art. 13).

On the 14th day of February, 1856, the Legislature passed the following statute, which is still in force:

"All charters or grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal, at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."—(Gen. Stat. p. 616).

On the 21st day of March, 1872, the Legislature, without the consent of the Louisville Gas Company or the City of

Louisville, passed an act incorporating certain persons under the name and style of the "Citizens' Gas Light Company of Louisville," with power to make, sell and distribute gas for the purpose of lighting the buildings, public and private, in the city of Louisville and its adjoining territories, "together with the streets, highways, lanes, alleys, parks and other public places." The third section of this act is as follows:

"Said company shall have power and authority, with the consent of the General Council of said city, to open the ground in any highway, street, lane, alley, park, or other public place within the limits aforesaid, and lay and repair therein their pipes for conducting gas, said company restoring the same to as good condition as before, within a reasonable time thereafter, said company being required, in so doing, not to injure any gas or water-pipe, or connection or sewer laid therein; and said corporation being liable to the city of Louisville for any damage it may have to pay for its negligence in so laying, repairing, or restoring as aforesaid; and such power and authority is subject to such reasonable regulations as the Mayor and City Council may make for the protection of life, property, and health of citizens."

The charter contains many other provisions, but they are not material to any question involved in this case.

This action was brought in the Louisville Chancery Court by the Citizens' Gas Light Company against the Louisville Gas Company and its Board of Directors praying for an injunction against the latter company restraining it from setting

up a claim to the exclusive privilege of manufacturing and supplying gas, etc., and asking that its original and amended charters of 1867 and 1869 be adjudged unconstitutional and void, and that the right of the complaining company to manufacture and supply gas be established. The petition is quite long and somewhat argumentative, but the grounds relied upon for relief appear to be—

1. That the titles of the acts of 1867 and 1869 do not conform to the requirements of the constitutional provision already quoted.

2. That the fifth section of the act of 1869, which confers certain exclusive privileges upon the Louisville Gas Company was prohibited by the first section of the thirteenth article of the State constitution.

3. That the fifth section of the amended charter was void because it created a monopoly.

4. That the act of March 21st, 1872, incorporating the Citizens' Gas Light Company and authorizing it to manufacture and supply gas to the city repealed the fifth section of the act of 1869.

The answer denies all the material allegations of the petition, recites the history of the legislation under which the plaintiff in error claims its exclusive rights, and relies upon the act of January, 1869, as constituting a valid and binding contract between it and the Commonwealth of Kentucky and the City of Louisville, which could not be annulled or altered without the joint consent of the company and the city, as

provided in the amended charter. It alleged that the company had agreed to perform, and had actually performed, valuable public services in consideration of the grant of exclusive privileges, and in an amended answer (Record 53), it was expressly claimed that the contract relied upon was protected by Sec. 10, Art. 1, of the constitution of the United States.

Upon the trial in the Chancery Court, the petition was dismissed, and from that judgment the Citizens' Gas Light Company prosecuted an appeal to the Court of Appeals. In the latter court the judgment of the court below was reversed, and a mandate issued directing "a perpetual injunction, restraining appellee from claiming and exercising the exclusive right to manufacture and supply gas to the city and the citizens of Louisville." (Record 57.)

The case is now brought here on a writ of error to the Court of Appeals, and the errors assigned are briefly as follows:

1. That the court erred in adjudging that the Legislature could repeal, and had repealed the charter of the plaintiff in error, and the *sixth* section of the act approved January 22, 1869, entitled "An act to amend an act entitled an act to extend the charter of the Louisville Gas Company, approved January 30, 1868," notwithstanding said act provided that "No alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the City Council, and the directors of the Gas Company.

2. That the court erred in adjudging that the charter of the plaintiff in error, and the *sixth* section thereof, were subject to repeal or amendment under the provisions of the act of February 14, 1856.

3. That the court erred in adjudging that the act of March 21, 1872, granting a charter to the defendant in error, repealed the *sixth* section of said act of January 22, 1869.

(It will be observed that by a clerical error the *sixth section* of the act of 1869 is referred to in every instance in the assignment, when, in fact, it was the *fifth* section of that act which granted the exclusive privileges claimed by the plaintiff in error.)

This court will examine the entire record, including the opinion of the State court, to ascertain precisely what questions were decided, and how they were decided. Prior to the passage of the act of Congress of 1867 (Rev. Stat. U. S. § 709), it was frequently decided that the opinion of the court below could not be regarded as a part of the record so as to authorize this court to examine it in determining the question of jurisdiction, but in Murdock *vs.* Memphis, 20 Wall. 633, a more liberal rule was adopted, and the practice has, we think, been uniform since that time.

Boughton *vs.* Exchange Bank, 104 U. S. 427;

Detroit Railway Co. *vs.* Guthard, 114 U. S. 133.

In the Civil Code of Kentucky, (§ 765), it is provided that "the court must deliver written opinions in all cases," and the oath of office prescribed for the clerk expressly requires

him to make "due entries and records of all orders, judgments, decrees, *opinions* and proceedings of the court, etc.' (Gen. Stat. of Ky. 199.) In the case at bar, the opinions of the judges are copied in full, and duly certified as parts of the record. (Record 57–67.)

It clearly appears from the pleadings in the case that the plaintiff in error has, throughout the litigation, relied upon the ground that its amended charter, approved January 22, 1869, constituted a valid and binding contract between itself, the City of Louisville, and the State of Kentucky which could not be constitutionally altered or repealed by the Legislature without the concurrence of the other parties as provided in the sixth section of the act itself. The judgment of the Louisville Chancery Court dismissing the petition of the defendant in error necessarily decided every question in the case in favor of the plaintiff in error; or, to be more specific, it necessarily decided that the titles of the acts under which the plaintiff in error claimed its corporate privileges and immunities were not defective, that the fifth section of the amended charter granting the exclusive privilege to manufacture and sell gas in the city was not prohibited by the State constitution, that the grant was not an illegal monopoly, and that it had not been repealed. Upon all these questions—except the question of repeal alone—the Court of Appeals either decided unanimously for the plaintiff in error or the judges were equally divided upon them, which was equivalent to an affirmance of the judgment

below to that extent. (Lesseur *vs.* Price, 12 How. 72.) The court was unanimous in the opinion that the titles of the acts of 1867 and 1869 were not defective under the constitution of the State, and was equally divided upon the question as to the constitutionality of the grant of exclusive privileges and upon the proposition that the legislation created an illegal monopoly. In other words the court treated the charter and amendment as a valid contract, and the fifth section as a part of that contract, but held that it was subject to alteration or repeal under the reservation contained in the act of 1856, and reversed the judgment upon that ground alone.

Had it not been for the recent case of the Louisville & Nashville Railroad Company *vs.* Palmies, 109 U. S. 244, we should have considered it our duty, upon this state of the record, to insist that this court ought not to re-examine or decide any question except that one upon which the State court decided against the plaintiff in error. If that single question had been decided the other way, either by a majority of the court or an equal division of opinion, the judgment of the Chancery Court, instead of being reversed, would have been affirmed, and the case could not have been brought here. The decision that the titles of the acts were not defective, and that the grant of exclusive privileges was not prohibited, was based entirely upon the construction of the State constitution, while the decision that the grants did not create an illegal monopoly was based upon the general principles of the common law applicable to all contracts. We had supposed that

this would be sufficient to establish conclusively the existence of a constitutional and legal contract in the State of Kentucky, and that this court could simply inquire whether its obligation had been impaired by the alleged repeal. In view, however, of the decision referred to, we merely call the attention of the court to the question, and respectfully ask it to compare that case with the carefully considered case of Murdock *vs.* Memphis, 20 Wall, 590, in which the rules and principles governing the jurisdiction of the court were re-examined, and restated with great clearness and force.

As associate counsel have said all that can, or need be, said concerning the sufficiency of the titles of the original and amended charters of the plaintiff in error, we do not propose to discuss that subject, but will confine this brief to a consideration of the other questions in the case.

1. Was the fifth section of the amended charter null and void because prohibited by the first section of article thirteen of the constitution of Kentucky? A mere glance at the constitutional provision is sufficient to show that its purpose was to prohibit grants of exclusive *public* emoluments or exclusive *public* privileges only in cases where there is no consideration of public services. By necessary implication it authorizes such grants in every case where there is a consideration of public services, and therefore disposes of much that may be said on the other side about the limits of legislative power and the general principles of equality and justice.

It would be difficult to determine precisely, or to state

accurately, what is a public emolument, or public privilege, or public service within the meaning of this provision, but the attempt is scarcely necessary in the present case, because it is evident if the exclusive privilege claimed by the plaintiff in error is a public one, the services performed and to be performed by it are public also. They are of precisely the same nature. The exclusive privileges granted are "the privilege of erecting and establishing gas-works in the City of Louisville during the continuance of this charter and of vending coal gas lights and supplying the city and citizens with gas," and, as a consideration for this grant, the plaintiff in error undertook to do, and has been doing, those very things. It would be a palpable misconstruction of the constitution to hold that the "public service" contemplated by it must consist of some distinguished civil or military achievment in behalf of the State or community, but that the "public emolument" or the "public privilege" includes the mere right to lay pipes in the streets of a city and furnish the municipality and its citizens with gas. The word "public" must be held to have the same meaning throughout the clause or it will be impossible to give it any rational or just interpretation. There is certainly nothing in the language or structure of the clause indicating an intention upon the part of its framers to use the word in more than one sense, and the court must therefore follow the well established rule of construction and give it the same meaning and force throughout. If this is done the grant must be sustained, because if the exclusive

privilege is public so are the services, while if the privilege is not public, the constitutional inhibition has no application to the case.

It is not the province of the courts to inquire into the adequacy of the consideration to support the grant. Of that the Legislature is the sole judge, and all the courts can rightfully do is to ascertain whether the services to be performed are public in their character; and they can not even do this unless they first find that a public privilege has been granted. If there be any public service, however inconsiderable, the grant is valid, even though there may be other considerations not of a public nature. Possibly the lighting of private residences and places of business is not a public service, and if this were the only undertaking of the plaintiff in error, and the only service it had performed, it might be plausibly argued that the exclusive grant was unconstitutional. But we do not think it can be seriously contended that laying pipes and erecting and maintaining lamp-posts on the public streets and grounds and lighting the streets and public buildings in a populous city, is not a public service. What constitutes a necessary, and in fact almost indispensable public service in such a place might be altogether useless and improper elsewhere; and so, while it may be a public service to manufacture and supply a particular article, it may not be a public service in the legal sense to manufacture and supply some other article equally necessary for the convenience and comfort of the community. Undoubtedly food and fuel and

clothing are as indispensable to the people as gas light or water, but it is not necessary to hoard these articles in large quantities or to provide expensive and permanent means for their distribution, and therefore each individual can easily supply his own wants, and the public authorities wisely refrain from interference in the matter. Besides this, the articles mentioned are not, to any great extent, used or consumed by the public as an organized body, as gas and water are, and they constitute no appreciable element in the administration of municipal government. For these and other reasons it has never been supposed that it was a public service to manufacture and supply a city or its citizens with fuel, food or clothing; but so general is the idea that the furnishing of gas and water to cities and towns and their inhabitants is a public service, that it is very common for the law-making power to authorize the municipal government itself to erect and maintain the necessary works and defray the expense by taxation upon all the property within its limits, and so far as we know neither the validity of such legislation nor the constitutionality of the taxes authorized by it has even been judicially questioned. (Cooley on taxation 98-99; Mayor of New York *vs.* Bailey, 3 Denio, 433; West *vs.* Bancroft, 32, Vt. 367; Rome *vs.* Cabot, 28 Ga. 50; Wells *vs.* Atlanta, 43 Ga. 67; Dillon on Mun. corp. §§ 97, 371, and other authorities cited by the authors).

In all such cases the tax is imposed not only upon those who reside or own property in the districts lighted or

supplied with water, but also upon those who, by reason of non-residence, or the location of their property, can not possibly derive any personal or pecuniary benefit from the expenditure. It is well settled by numerous decisions in the State courts, and by at least one carefully considered case in this court, that such taxes can be lawfully imposed only for strictly public purposes. (Cooley on Taxation, 42, 67, 76-80; Opinions of Judges 58, Me. 590; Commercial Nat. Bank *vs.* Iola, 2 Dillon, 353; Nat. Bank of Cleveland *vs.* Iola, 9 Kans. 689; Allen *vs.* Jay, 60 Me. 124; Curtis *vs.* Whipple, 24 Wis. 350).

In Loan Association *vs.* Topeka, this court said: "It is beyond cavil that there can be no lawful tax which is not laid for a public purpose," and it refused to sustain municipal taxation imposed for the purpose of aiding manufacturing enterprises, although such industries were admitted to be beneficial to the town and its inhabitants. In view of these decisions, and many others which might be cited, we think it clear that taxation for the purpose of erecting works and supplying cities and towns with gas and water could not be sustained unless the furnishing of these articles for municipal use is a public service. No line can be logically drawn between the "public purposes" for which taxes may be lawfully imposed and the "public services" which may be lawfully paid for, or which may constitute a sufficient consideration for the grant of an exclusive privilege within the meaning of the constitution of Kentucky. Surely if the purpose or object is public,

the party through whose labor or means it is accomplished must perform a public service.

If the City of Louisville were manufacturing and supplying gas for municipal use through its own officers and agents, it is perhaps entirely safe to say that no one would dispute the proposition that it was performing a public service, and the fact that it also furnished gas to private consumers for a compensation would make no difference. Upon what ground can it be argued that the legal character of the service is changed by the fact that the city, instead of manufacturing and supplying gas itself, has, under authority of law, contracted with the plaintiff in error to do so? But, as a matter of fact, the city is a large stockholder in the company and annually chooses, in its municipal capacity, four of the nine directors who superintend and control the service. (Record 24 and 28). These allegations are made in the demurrer, and not being denied in the reply, are admitted to be true. (Civil Code of Ky. § 126).

In any aspect in which the question can be viewed, the service to be performed by the plaintiff in error appears to be public in its character, and the grant was therefore a valid one under the constitution of the State.

2. It was contended in the court below, and was held by two of the judges, that the grant to the plaintiff in error of the exclusive privilege to erect works and sell gas to the city and citizens for twenty years, created a monopoly, and was void for that reason. If we are correct in maintaining that

the grant in question was authorized by the constitution of Kentucky, the proposition that it created an illegal monopoly cannot be established, because we suppose it to be indisputable that the people of a State, acting in their sovereign capacity, can empower the Legislature to create monopolies, unless there be something to the contrary in the constitution of the United States. As heretofore stated, the constitution of Kentucky, by necessary implication, authorizes the Legislature to grant exclusive public privileges in consideration of public services, and consequently if this is held to be a public privilege and a public service, there is an end of the question. But if it be conceded that this is not the character of grant contemplated in the constitution—that is, that neither the privileges nor the services are public—then it is merely an ordinary grant of an exclusive corporate privilege for a reasonable time and upon a good consideration, and there is nothing in the constitution, or in the fundamental principles of our government, to prohibit it. The consideration for this grant was precisely the same that exists in every case of a grant of franchises to a railroad or other private corporation: for it cannot be denied that the plaintiff in error undertook to perform valuable services for the public at large—not merely for the municipality of Louisville and its inhabitants, but for everybody who might have occasion to use the streets or public places lighted with gas. Whether these are public services or not in the constitutional sense, may be left out of the question for the present. Is a grant of exclusive priv-

ileges under such circumstances a monopoly in the ordinary sense of that term as used in the law? The generally accepted definition of a monopoly is "an institution or allowance from the sovereign power of the State by grant, commission, or otherwise, to any person or corporation for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty *they had before*, or hindered in their lawful calling."

This definition cannot be made to include a grant of exclusive privileges or franchises to a corporation created by an act of the Legislature for the accomplishment of a particular object, especially when the exclusive privilege or franchise is to do or enjoy something which is not of common right.

In the celebrated "Slaughter House cases," (16 Wall, 37), the company incorporated by the Louisiana Legislature was given—

1. The sole and exclusive privilege of conducting and carrying on the live stock landing and slaughter house business within the limits and privileges granted by the act.

2. The exclusive privilege of having landed at their wharves or landing places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson.

3. The exclusive privilege of erecting slaughter houses, and the exclusive privilege of having slaughtered therein all animals, the meat of which was destined for sale in the parishes of Orleans and Jefferson.

So far as this act prescribed the territorial limits within which stock should be landed and slaughtered, and so far as it required inspections to be made, it was undoubtedly a sanitary or police regulation, but the provisions which we have enumerated were simply grants of exclusive privileges or franchises to a private corporation, and had no necessary or natural connection with the police parts of the act. In deciding the case, this court said: "That wherever the Legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the power necessary to effect the desired and lawful purpose, seems hardly to admit of debate." (P. 64.) And again: "The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are, on the whole, exorbitant or unjust." (P. 65.)

The court then proceeded to consider the question of monopoly, and, after stating that the cases in England had arisen out of grants made by the crown, or out of transactions in which the people were unrepresented, used the following clear and explicit language:

"But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges

—privileges denied to other citizens—privileges which came within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the Legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the constitution of the United States, adopted since the date of the decisions we have already cited." (P. 66).

No argument of ours could add to the force of this statement of the law, and its application to the case at bar is too obvious to require comment. Until the principle upon which that decision was founded shall be repudiated by this court, the question whether a State Legislature, in the absence of a constitutional prohibition, can grant exclusive privileges to a corporation, upon a sufficient consideration, and for a reasonable time and a legitimate purpose, is not open to discussion.

3. It is evident from the facts heretofore stated, about which there is no controversy, that the amended charter of the plaintiff in error constituted a contract between itself, the State and the City of Louisville, and that the Legislature so

regarded it at the time. All the provisions of the amended charter, including the grant of the exclusive privilege and the clause that "no alteration or amendment to this charter shall be made without the concurrence of council and the directors of the Gas Company," had been expressly agreed upon by the city and the plaintiff in error before the application for its passage was made to the Legislature, and before the charter of 1867 had gone into effect. (Record 38). Upon the faith of this agreement, the plaintiff in error not only surrendered valuable rights and privileges which it had secured in the original charter, but it assumed important obligations not previously imposed upon it. Under the original charter the company could not be required to extend its street mains except when the income from private and public lights would pay eight per cent. on the cost of such extensions, but by the agreed amendment this was reduced to seven per cent. Under the original charter the company had the right to charge the City of Louisville the actual cost of supplying, lighting and extinguishing the lamps, provided that it did not exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago and St. Louis, but by the amendment it was provided that in no event should the charge exceed thirty-five dollars per lamp, no matter what the actual cost might be or what might be the average charges for such services in the cities named. There was in the original charter no limitation upon the prices to be charged private consumers, except that they should not exceed the

average charges in the cities just mentioned, but the amendment required such charges to be so regulated that the company's profits should not exceed twelve per cent. per annum upon the par value of the stock, ten per cent. of which might be drawn by the stockholders in semi-annual dividends, and the remainder to be expended for extensions and not be capitalized except at the end of each five years.

Upon these and other considerations, the City of Louisville agreed to the grant of an exclusive privilege for twenty years, and that there should be no alteration or amendment of the charter without the concurrence of both parties; and the Legislature, upon the same considerations, ratified the contract and enacted it into law. The provisions of the act of 1856, even if its language were broad enough to cover the case, could not be applied to such legislation without flagrantly impairing the obligation of the contract. (New Jersey *vs.* Yard, 95 U. S. 104.) But the express provision of the statute, taken in connection with the sixth section of the amended charter of the plaintiff in error, is, it seems to us, conclusive of the question. The statute before quoted, provides that all charters, grants or amendments thereof enacted since the 14th day of February, 1856, "shall be subject to amendment or repeal, at the will of the Legislature, unless a contrary intent be therein plainly expressed." Is not "a contrary intent therein plainly expressed, when it is plainly expressed that it shall not be altered or amended at the will of the Legislature," but only with the concurrence of two other parties?

It is scarcely possible to employ language expressing a contrary intent more plainly. If the sixth section had merely provided that the charter should not be altered or amended without the consent of the Gas Company, there would have been no room for controversy as to its effect, and we are wholly unable to understand how the strength of the provision is impaired by the fact that the consent of another party is also required?

If the Legislature had intended that the charter should be subject to alteration or amendment at its own will and pleasure, it was not necessary to say anything whatever upon the subject, because in the absence of any other provision the act of 1856 would undoubtedly apply. The mere fact, therefore, that it inserted any provision upon the subject in the amended charter, shows that it did not intend to rely on that statute for its authority to alter or repeal, but intended to make a new regulation or requirement in this particular case. That new requirement or condition was, as we have seen, that the company and the city should consent to the amendment or repeal, and we do not see how it could have been expressed in more appropriate language than that employed in the sixth section.

The construction given to the sixth section by the State court wholly destroys its effect as a part of the act, and is so inconsistent with its language and evident purpose, that we think it not necessary to do more than call the attention of this court to it.

4. But it will probably be argued that the charter of the

plaintiff in error was granted, and the exclusive privileges conferred, in the exercise of what is called the police power of the State, and therefore it was repealable at the pleasure of the Legislature, without regard to the act of 1856. If the premises be conceded, the conclusion does not, by any means, follow. Was not the charter of Dartmouth College, and hundreds of others heretofore considered by this and other courts, enacted in the exercise of exactly the same power? Indeed, it may be broadly asked, under what power, except the police power, does the State ever attempt, by public or private laws, to encourage and promote education, morality, charity, industry or trade among the people, or to provide for the security of their property, and their lives and persons? It is quite a serious matter if all the acts of incorporation and grants of privileges and immunities designed to aid in the accomplishment of these beneficent objects are to be swept away by the decision in this case, or at the least subjected to the will or caprice of thirty-eight Legislatures. That provision of the constitution which prohibits the states from passing laws impairing the obligations of contracts, will lose the greater part of its value whenever this court finally decides that legislative grants and chartered privileges are not protected by it simply because they were made or enacted in the exercise of the police power; for it is not often that the states attempt by law to annul or impair private contracts, while the instances are frequent in which they undertake to alter or repeal contracts contained in acts of incorporation. Hence,

the necessity for maintaining the involability of legislative grants and contracts in every case where it can be done with a due regard for the essential rights of the local governments and communities. It may be that gratuitous privileges have sometimes been confounded with vested rights, and alleged contracts enforced when none really existed, but this will not justify a resort to the opposite extreme.

Without attempting to define the exact limits of the police power, we think it would be substantially correct to say that the terms, in their most comprehensive sense, embrace almost every function of civil government under whatever form it may exist. It is the power to govern; the power to make rules and regulations for the preservation of the public peace and the promotion of the prosperity, comfort and general welfare of the community, and to see that these rules and regulations are executed. Of course we are speaking of State governments alone and of the powers exercised by them. Now it must be evident that there are a vast number of matters over which this power undoubtedly extends, but which may nevertheless be the subjects of binding contracts between the State and the citizen or between the State and corporations. A State, for instance, in order to promote trade and intercourse, incorporates a railway company and provides in the charter that it may charge certain maximum rates per mile for transporting freight and passengers. In passing the act of incorporation the Legislature is exercising the police power, and the provision in regard to rates is

essentially and purely a police regulation; its object is to prevent extortion and injustice. A subsequent Legislature may come to the conclusion that a mistake was made when the charter was passed, or that circumstances have so changed since that time as to make a reduction of rates necessary in order to promote the public welfare and further protect those who are compelled to use the railway. Can it make the reduction? A negative answer can be found in almost every volume of judicial decisions; and yet it certainly can make the reduction, or take any action it may choose in regard to that or any other charter, if the proposition be true that the law-making power must always have the right to do what it believes the "public good" or "the general welfare" or the "interests of the community" require.

This illustration is given—and many others will suggest themselves to the court—merely for the purpose of enabling us to present more clearly the proposition for which we contend; which is, that whenever the police power, or governmental power, or whatever it may be denominated, is so exercised, upon a consideration, as to confer property rights—that is, rights having an appreciable money or commercial value—a contract is created and the Legislature can not at its own pleasure resume its power over that particular subject so as to destroy or impair the rights conferred, except in a class of cases which we will presently mention.

It will not be contended, we presume, that any police power was actually delegated to the plaintiff in error, but only that

the Legislature itself in making the grant of exclusive privileges for twenty years, exercised that power. In this respect we are wholly unable to see any difference between the nature of the power exercised in this instance and that ordinarily exercised in the creation of corporations. All incorporated religious, educational and charitable institutions, all musical and literary societies, all associations for affording public amusement and recreation, all turnpike, railway, bridge, banking, insurance, manufacturing and trading companies are created in the exercise of the same power.

In fact it would be difficult to designate any class of incorporated bodies that does not owe its existence to the exercise of the police power by the Legislature. Yet the books are full of cases in which the charters of such companies have been sustained as valid and binding contracts, unalterable and irrepealable except with their consent or in virtue of a reserved power.

Of course, however, all these corporations, as well as all citizens, hold their property and rights of every kind subject to such *general laws* and regulations as the Legislature may, from time to time, consider necessary for the common good and general welfare; or, to quote the language of an eminent judge, they are held subject "to the power vested in the Legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and

welfare of the Commonwealth, and of the subjects of the State." (Commonwealth *vs.* Alger, 7 Cush. 84; Cooley on Const. Lim. 572–597, and authorities cited.) But this is a very different thing from an absolute repeal of their charters, or material and injurious alterations of their contract rights. Judge Cooley, in view of all the authorities, thus states the law on this subject: "The limit to the exercise of the police power in these cases must be this; the regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." (Const. Lim. 577, and cases cited.)

We think it is too plain for argument that the provisions in the charter of the defendant in error which, it is now claimed, repeal the fifth section of the amended charter of the plaintiff in error, are not "police regulations in fact," but a mere attempt to destroy one of its most important and valuable franchises for the benefit of another private corporation. This is not an exercise of police power at all, except in that broad sense which includes all legislation upon the subject of contracts and corporate rights, and we are not aware of any case in which it has been held that this general power of supervision and control could be constitutionally employed to

destroy or impair franchises previously granted upon a consideration.

As we understand it, the police power which can be exercised at all times, notwithstanding a previous grant, or act in form of a grant, is that power which the public authorities have to regulate and control, or to prohibit, such trades, occupations and practices as are, or may become, injurious to the public morals or detrimental to the public health, safety or peace—such, for illustration, as manufacturing or selling intoxicating liquors, setting up lotteries, carrying on gambling houses, keeping billiard tables, slaughtering animals, manufacturing or storing gunpowder or other highly explosive substances, and many others of a similar character. The reason why a State cannot abdicate its authority over subjects of this nature, or even surrender it temporarily by contract, must be obvious to every one. Organized society could not exist for any considerable time unless there was always some power available for the preservation of order and the protection of the health, morals and property of the community. But no such reason can be urged in support of the legislation complained of in the present case. The manufacture and sale of gas for illuminating purposes is not a noxious occupation any more than the operation of a railway or bridge; and the fact that the privilege was, by the terms of the grant, to be exclusive for twenty years can make no difference in this or any other respect. Such grants have been frequently sustained (West River Bridge Co. *vs.* Dix. 16 Vt. 446; 6 How. 507:

Binghampton Bridge case, 3 Wall 51; Shorter *vs.* Smith 9 Ga. 529, Piscataqua Bridge *vs.* N. H. Bridge, 7 N. H. 85; Boston Water Power Co. *vs.* Boston & Worc. R. R. Co., 23 Pick. 360; Boston & Lowell R. R. Co. *vs.* Salem & Lowell R. R. Co. 2 Gray, 9; Costar *vs.* Brush, 25 Wend 628; California Telegraph Co. *vs.* Alta Telegraph Co. 22 Cal. 398).

The exclusiveness of the grant is no more a "police regulaition" than any other feature of the charter. In other words, the fact that the grant is exclusive does not in any way affect the public morals, health or safety, and the exercise of the privilege under an exclusive grant is as free from objection in this respect as if the franchise had been conferred upon each inhabitant of the city.

So far as we know, this court, in all its decisions upon questions relating to the effect of the police power upon legislative grants, has recognized the distinctions which we have endeavored to state in this argument. We need not cite the cases here because they are familiar to the court, but as the last one reported is much relied on by the defendant in error, we call attention to the language used on this point. In the case of the Butchers' Union *vs.* Crescent City Co. 111 U. S. 746, the court, after stating the general principle, said: "While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it can not by any contract, limit the exercise of those powers to the prejudice of the general

welfare. These two subjects are the public *morals* and the public *health*" (p. 750–751). The correctness of this statement can not be questioned, but when an attempt is made to establish the doctrine that no valid contract can be made on any subject over which the general police power of the State extends, we respectfully submit that it is time to pause and consider the disastrous results that must inevitably follow. The Legislature of Kentucky would undoubtedly have the right, by general laws, to regulate the manufacture and distribution of gas in all the cities of the State, just as it has the right by general statutes to prescribe reasonable rules and regulations for the operation of railways and other *quasi* public works. This could be done in the exercise of that general police and supervisory power which the State necessarily possesses over the conduct, and, to a certain extent, over the the business of all its citizens, and especially over those who are engaged in occupations affecting the public interests. This power cannot be lawfully alienated or suspended by contract or otherwise. It is easy, however, to see that this is very different from the repeal of particular charters and the destruction of corporate rights and franchises; for, as we have already shown, these general rules and regulations can not be enforced if they are inconsistent with rights or privileges previously granted.

We respectfully ask a reversal of the judgment.

J. G. CARLISLE,
Of Counsel for Plaintiff in Error.

GOODLOE & ROBERTS,
HARGIS & EASTIN,
Counsel.

Supreme Court of the United States.

LOUISVILLE GAS COMPANY, - Plaintiff in Error,

VERSUS

The Citizens Gas-light Company, of Louisville, - Def't.

BRIEF FOR PLAINTIFF IN ERROR.

J. G. CARLISLE,
JNO. K. GOODLOE,
Counsel for Plaintiff in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE, KY.

Supreme Court of the United States.

LOUISVILLE GAS COMPANY, - - *Plaintiff in Error,*

VERSUS

THE CITIZENS GAS-LIGHT COMPANY, - - *Defendant.*

Brief for Plaintiff on writ of Error.

In the case at bar the record shows that the citation upon the writ of error was signed and the bond approved by the Chief-Justice of the Court of Appeals of Kentucky. The writ of error has no indorsement upon it showing that it was allowed.

It may be suggested that there is an informality in bringing the case here. We believe a review of the statutes and decisions upon this subject will show that all has been done which is required by law to be done. In Buell v. Van Ness, 8 Wheaton, 320, the court said:

"The writ of error is the act of the court; its object is to cite the parties to this court and to bring up the record. How else is this court to ascertain whether the judgment be final? Nor can there be any danger of its being hastily or erroneously used, since it must be allowed either by the presiding judge of the State court, or a judge of the Supreme Court of the United States."

Following this case it has been held that in order to sue out a writ of error from a State court, the party desiring the same must obtain the writ from the clerk of this court or of a circuit court of the United States, and then present the same with the record of a judge of this court or a presiding judge of the State court and obtain from him an allowance of the writ.

Mitchell v. Commonwealth, 7 Wall. 324.

Gleason v. Florida, 9 Wall. 782.

Bartemeyer v. Iowa, 14 Wall. 26.

But what is meant by the allowance of the writ? What is required of the presiding judge of the State court in allowing the writ? These questions are readily answered.

By section 25 of the Judiciary Act (1 U. S. Stat. 85), it is provided that the final judgment in a State court may be examined by this court upon a writ of error, the citation being signed by the chief-justice or judge or chancellor of the State court or by a justice of this court. And by section 22 of the same act the judge or justice signing the citation is required to take a bond from plaintiff in error that he will prosecute his writ with effect or answer the damages. This is substantially repeated in the act of 1867.

14 U. S. Stat. 386–7.

And again, in sections 999 and 1000 of Revised Statutes.

So that when the Chief-Justice of the Court of Appeals of Kentucky signed the citation and took the bond he did all that the statute either authorized or required him to do. This is made plain by the opinion in Bartemeyer v. Iowa, 14 Wallace, 27. Mr. Justice Miller there says:

"Writs of error to the circuit court under the 22d section of the judiciary act issue as a matter of course and can be obtained from the clerk of the circuit court, and when filed in his office by the party are duly served. But writs of error to the State courts can only issue when one of the questions mentioned in the 25th section of that act was decided by the court to which the writ is directed, and in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the chief-justice or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States."

According then to this opinion, when the chief-justice signs the citation he does that which the statute requires to be done as a guaranty against the improvident issue of the writ.

This is then the allowance of the writ, and the only al-

lowance the statute contemplates. Nor is there any rule of court requiring or suggesting any other formality.

In Ferris v. Coover, 11 California, 177, there was an application for a citation upon a writ of error sued out from the Circuit Court of the United States for California and for leave to execute the proper bond for supersedeas. This was treated as without question an application to make effective the writ. There was no suggestion any where of any other method of "allowing" the writ. So in Hart v. Burnett, 20 Cal. 170, we find the same thing. We make the following quotations from this case.

From the statement of the case: "The judgment of this court, which was sought by this proceeding to be carried before the Supreme Court of the United States for review, will be found with the decision in the report of the case. (15 Cal. 530.) The plaintiff procured the issuance of a writ of error by the clerk of the United States Circuit Court for the District of California directed to the justices of this court; and upon its presentation applied to the chief-justice for a citation to the defendants in error, upon which the following opinion was delivered."

Field, C.-J., said:

"In this case the plaintiff presents a writ of error directed to the justices of the Supreme Court of this State, issued by the clerk of the Circuit Court of the United States for the District of California, and applies for a citation to the defendants in error."

Then, after quoting sec. 25 of the judiciary act:

"By the provisions of this section in such cases, the chief-justice of this court is authorized to issue the citation. That duty or that power is cast on him alone. The associate justices have nothing to do in the premises. The act is his as a chamber proceeding. But still the power is in its nature in some degree judicial. . . . In accordance with the views here expressed I must, when applied *to for a citation*, judge in the first instance whether the case is covered by the act of Congress. . . . . Application for citation denied."

This is followed up by the case of Greeley v. Townsend, 25 Cal. 607.

We make the following extracts from the opinion of Sanderson, C.-J.:

"At the last term of this court a judgment was rendered in this case affirming the judgment of the court below. The defendant against whom the judgment was rendered now presents a writ of error addressed to the justices of this court, issued by the clerk of the Circuit Court of the United States for the Northern District of California, and applies to me as chief-justice of the court for *a citation* to the defendants in error."

Then follows a statement of the terms of the judiciary act and the assertion that the judge, when applied to for a citation, can consider whether the case is within the terms of that act. The opinion proceeds:

Mr. Conklin in his treatise (page 683) says: "When the writ of error is to a State court, the citation may be signed by the presiding judge of the court to which it is directed, or by any justice of the Supreme Court of the United States. It is usual, in imitation of the English practice, also to have the writ of error allowed by the judge. But the act does not in terms require it; nor is there any rule in the Supreme Court requiring it, and no formal allowance beyond what is implied by the approval of the security offered, and the signing of the citation is necessary in any case, unless it is made so by rule or established usage in the particular circuit court to which it is returnable."

And again:

"To me it seems clear that Congress foresaw that the provisions of the twenty-fifth section might lead to great abuse unless some check was interposed to the hasty and unauthorized use of the remedy thereby granted in certain cases; and to that end *the allowance of the writ* or *what is equivalent thereto, the issuing of the citation*, was designedly placed in the sound discretion of the presiding judges of the State courts and the several justices of the Supreme Court of the United States."

This is clearly sufficient to show what was thought to be the meaning of the expression "allowing a writ of error."

In Worcester v. Georgia, 6 Peters, 536, this court said, in reference to the record in that case:

"It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned and is also authenticated by the seal of the court. It is returned with and annexed to a writ of error issued in regular form, the citation being signed by one of the associate justices of the Supreme Court, and served on the governor and attorney-general of the State more than thirty days before the commencement of the term to which the writ was returnable."

"The Judicial Act (secs. 22 and 25, 2 Laws of U. S. 64 and 65), so far as it prescribes the mode of proceeding appears to have been literally pursued."

Now the above description applies in all respects to the writ of error in this case.

But there is a strong authority to the same effect much later.

By section 692, R. S., U. S., it is provided that an appeal shall be allowed to the Supreme Court from final decrees of circuit courts in equity.

In Barrel v. Transportation Company, 3 Wallace, 424, and Pierce v. Cox, 9 Wallace, 786, it was held that unless the record showed the allowance of an appeal, the Supreme Court would dismiss the case as for want of jurisdiction.

But in Sage v. Railroad Company, 96 U. S. 714, this court expressly held that "the statute makes no provision in terms for the form of the allowance of an appeal (Rev. Stat., 692); but as there can be no appeal without the taking of security either for costs, or costs and damages, and this is to be done by the court, or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is in legal effect the allowance of an appeal."

This case shows that an appeal was prayed from certain final orders of October 21, 1875, and August 31, 1877, in open court and allowed. Sage, etc., also asked that security for a supersedeas, might be accepted and approved. The

court entered an order allowing the appeal, but refused to accept a supersedeas bond. The bond for appeal was fixed at $1,000, to be made to the clerk of the court in trust, etc., approved by one of the judges of the court and filed within thirty days. No bond of any kind was executed at that time, and that appeal was not perfected.

Subsequently a petition was presented to Mr. Justice Hunt, of this court, by Sage, etc., setting forth the taking of the appeal by them in open court from the order of 31st August, 1877, and its allowance and stating further that no supersedeas bond was given or approved. They thereupon tendered a bond, payable to the clerk of the court, in the sum of $20,000, which they asked that justice to approve and allow to operate as a supersedeas bond in the cause. The security being satisfactory, the bond was approved to operate as a supersedeas when the same was filed, and it was filed September 22, 1877. On the 24th September, Sage, etc., executed another bond payable to the clerk in the sum of $1,000 for a supersedeas, which was approved by the district judge for the District of Iowa and filed.

There was a motion to dismiss the appeal, or in case that motion should not be granted, for a vacation of the supersedeas, and both motions were denied.

In discussing the question as to the supersedeas, the court said:

"The statute makes no provision in terms for the form of the allowance of an appeal (Rev. Stat., sec. 692); but as there can be no appeal without the taking of security, either for costs, or costs and damages, and this is to be done by the court or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is in legal effect the allowance of an appeal. . . . Whenever, therefore, security for an appeal is accepted during the term, an appeal is allowed. If the security is taken out of court, and after the term, a citation should be issued to bring in the parties, unless they voluntarily appear; for until the security has been accepted, the allowance of the appeal can not be said to be perfected. Whoever can sign a citation may allow an appeal; and by Sec. 999, Rev. Stat., it is provided that

this may be done by a judge of the circuit court, or a justice of this court. . . . When, therefore, Mr. Justice Hunt accepted the security in this case he allowed an appeal, which, by reason of the form of the security, was to operate as a supersedeas."

The statute requires an allowance of an appeal, and the court holds that the acceptance of security and signing of a citation by a justice of the Supreme Court is the allowance of the appeal, without any formal order of allowance by the judge.

Now, if the statute requiring in terms the allowance of an appeal is satisfied by the taking of a bond and signing a citation by the proper judge, *a fortiori*, will such bond and citation perfect a writ of error, for which the statute does not prescribe any "allowance," but for which it does provide the very steps here taken.

We respectfully submit that this case and its reasoning is a conclusive authority upon the point in question.

And we make this further suggestion: In the case of Twitchell v. The Commonwealth, and Gleason v. Florida, before referred to, it was substantially said that writs of error to the State courts have never been allowed as a right; that the practice had been to submit the record to the proper judge of the State court or a judge of this court to ascertain whether the case upon the face of the record will justify the allowance of the writ; that the foundation of the jurisdiction of this court over the judgments of State courts is the writ of error, which could not issue without allowance by one of the judges named.

The allowance of the writ is referred to as a matter of practice. It is not prescribed in any statute or in any rule adopted and published among the rules of court, and is not, therefore, made a jurisdictional fact by the statute or rules. We submit that this mere rule of practice may be waived; and, if so, there has clearly been a waiver of it in the case at bar, by virtue of the steps taken, which we now set forth.

In March, 1885, a stipulation under the 20th Rule of the Supreme Court was entered into and filed by the parties, by which it was agreed that this case should be submitted on the first Monday in November, 1885, upon printed arguments. It appears from said stipulation that a motion was pending before Mr. Justice Matthews for a supersedeas of the judgment of the Court of Appeals of Kentucky in this case, and it was agreed between the respective parties that the motion for the supersedeas should be overruled and the case submitted on printed arguments. Accordingly, the motion for a supersedeas was overruled by the justice and the stipulation filed in the case. Did not these steps waive the rule of practice? Is not that stipulation a virtual consent to dispense with this rule of practice?

The only thing the record fails to show in this case is the formal allowance of the writ. The defendant has consented to have the case heard on printed argument, in consideration that the motion for supersedeas should be overruled. This ought to estop it from asserting the rule of practice against the plaintiff in error, for the agreement was based upon a consideration, of which the defendant has had the benefit. The record will show that the writ of error has not been hastily or improperly issued in this case.

Other rules of practice in reference to bringing up cases for revision of the judgments of the State courts have been waived by the court and parties.

In Gelston v. Hoyt, 3 Wheaton, 246, the writ of error was directed to the Court of Errors of New York, which, having parted with the record, could not execute it. It was then presented to the Supreme Court, to which the writ should have been directed, but being directed to the Court of Errors, could not be executed by that court. The parties then consented to waive all objections to the direction of the writ, and to consider the record as properly brought up, if, in the opinion of the court, it could then be done on a writ of error directed to the Supreme Court of the State. The

court being of opinion that this might be done, the case stood as if the writ had been properly directed.

The act providing for the review of a judgment of a State court expressly requires that the citation shall be signed by the chief-justice of a State court or a justice of this court, and yet it has been frequently held that an appearance waives the citation.

We have seen that Sec. 692, U. S., requires that an appeal shall be allowed to the Supreme Court, etc., and in the cases cited from 3d and 7th Wallace, it was held that the allowance of the appeal must appear upon the record. But, as we have seen in the late case of Sage v. Railroad Company, no application was made for the allowance of an appeal, and the court held that the acceptance of a bond and allowance of citation when necessary is, in legal effect, the allowance of an appeal, thus waiving the formal allowance thereof. It seems to us that these cases make out the point of waiver which we here present. The citation, the direction of the writ, the obtention of the record from the court having it, and that can authenticate it, and the allowance of an appeal are as important, as essential, and as necessary as is the allowance of the writ. If one or all of those steps mentioned as having been dispensed with may be, why not the allowance of the writ in this case? One is not more fundamental than the other.

In a case where an appeal had been prayed for, but the record did not show its allowance, and an appeal bond was subsequently filed in court and approved by one of the judges, itwas held that from those facts an actual allowance of an appeal might be inferred. (Railroad Company v. Bradleys, 7 Wallace, 575.)

So when a citation has been allowed and signed by the chief-justice of the court in which the judgment sought to be brought up for revision was rendered and bond approved by him, why may not the allowance of the writ be inferred from those facts? The allowance of a writ of error, as of an

appeal, may be shown by evidence *aliunde* the record. We do not see why such facts as will authorize the inference of an allowance of an appeal may not authorize the inference of an allowance of a writ of error. The case of Bartemeyer v. Iowa, 14 Wallace, 26, is an authority for the proposition we have presented.

It is true that in that case the court, after saying that the statute requires that the citation must be signed by the chief-justice, or proper judge or chancellor of the court rendering the decree or judgment complained of, or by a justice of the Supreme Court of the United States, went on to speak of the rule of practice, that a writ of error must be allowed by one of the judges mentioned, or it will be dismissed for want of jurisdiction; but the court will see that the point emphasized by Justice Miller was the defect in the citation, which had been signed only by an associate justice of the Supreme Court of Iowa. The proceeding was, therefore, not in compliance with the express provisions of the act of Congress, which requires the citation to be signed by the chief-justice; and, for that want of conformity to the statute, it was bad; and the judgment of dismissal was based on that statutory defect.

It is also true that that case was submitted on printed briefs in advance of its regular call; but there was no consideration for the stipulation as in the case at bar.

The point that the submission on printed arguments was a waiver of the rule of practice under consideration, seems not to have been made by counsel or considered by the court. But whether it was or not, from the judgment dismissing the writ Mr. Justice Swayne, the Chief-Justice, and Mr. Justice Bradly dissented, saying that objection was not taken by counsel for the defendant in error, that the writ had been allowed and citation signed by an associate justice of the Supreme Court of Iowa, which was in their opinion sufficient, and that the construction given to the provision of the statute in question was unwarrantably narrow.

This dissent clearly indicates to our minds, that the dissenting justices thought that, by entering into the stipulation under the 20th rule of this court, the objection that the writ had not been allowed and citation signed by the chief-justice of the State court could be and was waived.

We desire to suggest that the case of Twitchell v. The Commonwealth, 7 Wallace, is not in point, and that the case of Gleason v. Florida, 9 Wallace, was a peculiar case, decided under peculiar circumstances.

The requirement of an allowance of the writ of error is not even suggested by the statute or any printed rule of court, and the construction of the statute found in the cases mentioned is misleading, if they are to be construed as requiring something beyond that which the statute requires. In the case at bar the record shows that the act of Congress prescribing the mode of proceeding in bringing up a case from the State court by writ of error has been literally complied with. See Worcester v. Georgia, 6 Peters, 536.

We therefore respectfully submit that the case should be heard on its merits.

J. G. CARLISLE,
JOHN K. GOODLOE.
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
NOV 2 1885
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE LOUISVILLE GAS COMPANY, - Plaintiff in Error.

versus

THE CITIZENS' GAS-LIGHT COMPANY, of Louisville, - - - Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN MASON BROWN,
GEORGE M DAVIE,
Of Counsel.

COURIER-JOURNAL JOB PRINTING CO.

Supreme Court of the United States.

THE LOUISVILLE GAS COMPANY, - - - Plaintiff in Error,

VERSUS

THE CITIZENS' GAS-LIGHT COMPANY OF LOUISVILLE, - - - - - Defendant in Error.

BRIEF FOR APPELLEE.

This case is before the Court upon a writ of error from the Court of Appeals of Kentucky.

STATEMENT OF FACTS.

A corporation, styled the "Louisville Gas and Water Company," was incorporated by an act of the Legislature of Kentucky, February 15, 1838 (Acts of 1838, page 206). By the said charter, the said corporation was to continue in existence for "thirty years from the first day of January, 1839." It was empowered and authorized to carry on the business of erecting a gas-works in the City of Louisville, and of making and selling gas to the city and citizens of Louisville "for public and private lights;" and, by section ten of the said charter, it was provided that the company should have the exclusive privilege of making and selling gas-lights in said city, during said charter.

The said charter expired, and the said corporation terminated its existence, on the first day of January, 1869.

On January 30, 1867 (about two years before said company was to expire), the Kentucky Legislature passed an act by which it created *another* gas company, to be styled the "Louisville Gas Company;" which was to come into existence on the "first day of January, 1869," the day on which the old company was to expire, and was to continue in existence for twenty years from that date.

By this charter of 1867, the *new* corporation, thereby created, was

authorized "to make and furnish gas to the City of Louisville, and the residents thereof, and to vend the same;" and, by section nineteen, it was provided "the *new* company shall become successor to the old company." But no *exclusive* privilege or monopoly was given to the new company of 1867.

The Court of Appeals of Kentucky, in the case of Commonwealth v. Cain, 14 Bush, 535, had this charter of 1867 before it for construction; and it held that the said act did not continue in force the old corporation of 1838, nor the charter of that old corporation, but created an entirely "*new*" corporation. The Court there said:

"On the contrary, provisions are made for the organization of an *entirely new* company; the powers and privileges and franchises of which are to be found in the act of *1867*, and *not* to *any extent* in the act of *1838*." (14 Bush, 535.)

This new company came into life on the first day of January, 1869, the day that the old company expired; and at once became the purchaser of the property of the old company, and the stockholders in the old company took stock in the new company.

On the 22d of January, 1869, nearly a month after the new company had come into existence, and had acquired the property of the old company, and while it was engaged in conducting its works, an amendment was obtained from the Legislature to the charter of 1867. This amendment is to be found in the Acts of 1869, Vol. 1, page 166.

The preamble to said amendment of January 22, 1869, is as follows:

"WHEREAS, the City of *Louisville* and the stockholders of the old Louisville *Gas Company have* accepted said extended charter, and have agreed to certain amendments thereof, and desire that they may become a part of said extended charter," etc.

Section five of said amendment of January 22, 1869, is as follows:

"The said gas company shall have the *exclusive* privilege of erecting and establishing gas-works in the City of Louisville during the continuation of this charter, and of vending *coal*-gas lights, and supplying the city and citizens with gas by means of *public* works; provided, however, this shall not interfere with the right of any one to erect, or cause to be erected, gas-works on their own premises, for supplying themselves with light."

Section six of said amendment is as follows:

"No alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company."

No consideration was paid by the company for this after-grant of an exclusive privilege. The gas-works had already been built many years before, and, as is shown in the opinion of the Court of Appeals in this case, there was nothing of value given by the gas company for this benevolent after-grant of a monopoly.

On March 21, 1872, the Legislature of Kentucky passed an act entitled "An act to incorporate the *Citizens' Gas-Light Company* of Louisville;" by which the defendant in error was created a corporation, "for the purpose of making, selling, and distributing gas, for the purpose of lighting the buildings, public and private, in the City of Louisville and its adjoining territories, together with the streets, highways, lanes, alleys, parks, and other public places therein." (See a copy of the act printed in the record, pages 13 to 17.)

It was authorized to issue and sell stock for the purpose of raising the moneys necessary for the building of the works, and carrying on of its business; and it was authorized, with the consent of the general council of the city, to lay its pipes in any of the streets or other public places of the city. Said charter was, by its thirteenth section, to "take effect from and after its passage, and be, and continue, in force for the term of fifty years."

The Citizens' Gas-Light Company (which we shall hereafter speak of as the "*new*" gas company) was not given any *exclusive* privilege, and makes no claim to any exclusive privilege of any kind.

This new company obtained the City of Louisville's consent to the laying of pipes along the streets of the city; and, having organized as a corporation, attempted to begin its business of making and selling gas.

The Louisville Gas Company of 1867 (which we shall hereafter speak of as the "*old*" company) thereupon asserted a claim to the *exclusive* privilege of making and selling gas in Louisville, and of using the streets of Louisville for that purpose; and asserted publicly that the new company had no right to build a gas-works, or to make or sell gas in Louisville, and that the grant to the new company of the franchise to lay pipes in the streets of Louisville was a void act, and conferred no valid franchise; and, by thus claiming exclusive rights in its behalf, and by its public assertion of the illegality and voidness of the grants and franchises claimed by the new company, it threw such a cloud over the new company, and its rights and franchises, as to prevent persons from subscribing for stock therein until the matter of

the claim of the exclusive privilege by the old company, and the right of the new company to compete, should be settled by a decision of the Courts.

In other words, the franchises of the new company to sell stock, organize, lay pipes in the streets, and carry on business, was rendered utterly useless, by reason of the cloud caused by the assertion of an "exclusive" claim on the part of the old company. The old company also publicly and constantly threatened to prevent the new company from opening any street or laying any pipe or selling any gas in the City of Louisville.

In view of these threats, and also to remove the cloud from, and quiet its title to, its franchises to sell stock, organize, and lay pipes in the streets, and sell gas through them, the new company filed this suit, in the Louisville Chancery Court, and prayed that the old company be enjoined from claiming or exercising the exclusive privilege aforesaid, and from its threatened acts of preventing the new company from laying pipes through the streets of Louisville, and making and selling gas therein.

The case was carried to the Court of Appeals of Kentucky, and that Court decided that the new company was entitled to the injunction prayed for, and has ordered the injunction to be issued. The new company, in pursuance of that judgment, has built its gas-works in the City of Louisville, and has laid pipes in the streets of said city and is furnishing gas to the citizens thereof, of the kind known as "*water*-gas," and is selling it in competition with the "*coal*-gas" of the old company. From that judgment of the Court of Appeals of Kentucky, this writ of error has been prosecuted by the old company.

The Federal question, upon which the writ of error from the State Court to this Court was allowed, arises under the clause of the Federal Constitution, by which State Legislatures are forbidden to impair the obligation of a contract. The old company contends that the act of January 22, 1869, purporting to give it the *exclusive* privilege of making and selling coal-gas in Louisville, gave it a *contract* right to said *exclusive* privilege, for the period of twenty years; and that the act of 1872, giving to the new company the right to lay pipes in the streets of Louisville, and to make and sell gas there, was an *impairment* of said "contract" right of the old company to said exclusive privilege. This is, in effect, the only error assigned on this appeal.

The Citizens' Gas-Light Company (the new company) submits the

following points, reasons, and authorities in support of the correctness of the judgment of the Court of Appeals of Kentucky:

I.

The grant to the old company of the exclusive privilege of making and selling gas was in effect and substance a prohibition against other persons engaging in the manufacture and sale of gas in Louisville; and such a prohibition was unconstitutional and void; unless it is sustainable as an exercise of the Police Power of the State.

It will be observed that the exclusive privilege granted to the old company was not an exclusive privilege of laying pipes in the streets.

It was only an exclusive privilege of

"Erecting and establishing gas-works in the city of Louisville, and of vending coal-gas lights and supplying the city and citizens with gas by means of public works."

There is nothing said there about giving the *exclusive* franchise to lay gas-pipes in the streets. And it is a settled rule that there is no implication in favor of an exclusive privilege; and an exclusive privilege with respect to public streets will not be allowed, unless the language plainly gives it. (Charles River Bridge v. Warren Bridge, 11 Peters, 420; High on Injunctions, Section 902, and cases cited there.)

Now, the operating and taking tolls on railroads and other highways or bridges, and the operating and taking tolls on ferries, is, and always has been, a duty and prerogative of the Government; and the *State* has the *exclusive* privilege to so operate them. (Angell on Highways, Chapter 2, 54; Redfield on Railways, Vol. I., Chapter 11; State v. Boston R. R., 25 Vermont, 442; Olcott v. Supervisors, 16 Wallace, 693; Railroad v. Campbell, 44 Cal., 91; Applegate v. Railroad Company, 8 Dana, 295; Bacon v. Commonwealth, 13 Bush, 212.)

As the State has to act through agents, the State may delegate *its* exclusive right to operate ferries, bridges, highways, etc., to other individuals or corporations; but, as was said in Olcott v. Supervisors (16 Wallace, 694), "no matter who is the agent, the function performed is that of the *State*." As the State has the exclusive privilege

of operating railroads and ferries, therefore the State has the right to give that exclusive privilege to others; and the citizen is not deprived of any of his rights by the granting of *such* exclusive privilege; because the citizen had no right to operate such sovereign instrumentalities. (3 Wallace, 81.)

As the Court of Appeals of Kentucky said, in Com. v. Bacon (13 Bush, 212):

> "It is the duty of the Government to establish and maintain highways. Ferries are part of the highways, and the Government may perform its duty in establishing and maintaining them through the agency of individuals or corporations, and such agencies are the representatives of the Government, and perform for it a part of its functions. And, in consideration for the services thus performed for the public, the Government may *prohibit* altogether persons from keeping ferries and *competing* with those it has licensed. The establishment of public highways being a function of Government, no person has a right to establish such a highway without the consent of the Government, and hence, in prohibiting unlicensed persons from keeping a ferry, the Government does not invade the right of even those who own the soil on both sides of the stream."

But, when the State attempts to give an exclusive privilege to one person with respect to a matter which is not embraced under the *sovereign prerogatives* of the Government, but is an ordinary business, open to all citizens, it is a very different matter.

No one can complain if the Government lends its exclusive privilege of exercising its sovereign prerogatives of running a railroad to any person, because such grants do not interfere with any one else's previous rights. But every one can complain when the State attempts to give the exclusive privilege of operating an ordinary business to one person: for that invades the rights of every other man.

There are, therefore, *two classes* of exclusive privileges.

The first class is an exclusive privilege given by the Government to an individual or company to perform one of these *governmental functions*, such as running a railroad, building a bridge, or operating a ferry, which the Government has the exclusive right to operate itself, and which exclusive privilege, therefore, it can, without criticism, confer upon another.

The second class comprises the attempted grants by the State of the "exclusive right" to an individual of carrying on an ordinary business, which the State has not the exclusive right to carry on.

As to this latter class, the State, having no exclusive right to carry on the business itself, can hardly grant to others that right which it does not possess. It has no such exclusive privilege to grant. It could only make an *indirect* grant of exclusive privilege, by forbidding, under the exercise of its Police Power, the carrying on of that business by any one else except the certain individual or corporation specially licensed therefor, or specially named. In other words, in this latter class of cases, it does not *grant* the exclusive privilege to a person, strictly speaking, but in *effect forbids* everybody from exercising the business, except one person named.

Now, the business of erecting gas-works, and making and selling gas, is not a *Governmental Function*; and, therefore, it is not requisite to obtain a permit from the State, before engaging in it. It, therefore, does not come under the first class of exclusive privileges; but under the second class, if any.

Cities are under no obligation to light the streets, and are not liable for failing to light them. (106 Mass., 276; 100 Mass., 255; 1 Allen, 30; 83 Illinois, 440; Dillon's Mun. Corp., Sect. 1,010; Cooley's Const. Lim., page 255, note.)

"It is no part of the duty of the Government to provide the community with lights in their dwellings, any more than it is to provide them with the dwellings themselves, or any of the necessaries or luxuries which may be deemed important for the comfort or convenience of the community." (Norwich Gas-Light Co., case 25 Connecticut, 37.)

"The supplying of gas-light is no more the duty of the sovereignty than the supplying of water." (Western v. City of Philadelphia, 31 Pa. State, 183.)

"As a local sovereign, it (Philadelphia) has no authority to enter into the business of the manufacture and sale of gas; for its sovereignty did not extend to such objects, any more than it did to any other manufacture." (Western v. Philadelphia, 31 Pa. State, 189.)

"The business of manufacturing and selling illuminating gas is not a *prerogative of government*. Like the manufacture and sale of any other article of ordinary traffic, it is open to all; and may be carried on by any person, without legislative authority." (New Jersey Gas Co. v. Dwight, 29 N. J. Equity, 248.)

"Here is no franchise, within the definitions given. The privilege conferred and withheld (the exclusive privilege of operating gas-works) is not one which can not be exercised without a legislative grant; but it is one which belongs to the citizens of a country generally, by common right. The persons deprived are not in the situation of one who is only excluded from that to which he never had any right. They have always been, and still should be, entitled, as of natural and unquestionable right. There is no grant of anything from the State's prerogative." (St. Louis Gas-Light Company, 19 Central Law Journal, page 201, 15 Mo. Appeal Cases.)

It is well settled in England, also, that a gas company or individual does not need any legislative authority or permit to enable it to engage in the business of making and selling gas. (Atty. Gen. v. Cambridge Gas Co., Law Reports, 4 Chancery Appeals, 86; Hodderson Gas Co. v. Haselwood, 6 Common Bench R., new series, 249; 3 De-Gex. M & G., 304; L. R., 4 Chancery Appeals, 71; L. R., 7 Chancery Division, 217; 12 Allen, 75.)

The right to erect a gas factory, and the right to make and sell gas, not requiring any legislative grant; the *grant* of an "exclusive right" to one company to so make or manufacture has no meaning, except to *prohibit others* from making and selling gas.

"What then is the necessary effect, when the State undertakes to confer upon one person or corporation the sole and exclusive privilege of pursuing a lawful calling, labor, or occupation, in the manufacture or sale of any commodity? The first visible effect is, that all persons *other than the grantee* are thereby directly *prohibited* to pursue that calling, labor, or occupation." (St. Louis Gas-Light Company, case 19 Central Law Journal, 201, 15 Mo. Appeal cases; see also 35 La. Ann., 1,113.)

As the old gas company had the right to make and sell gas, anyhow, without legislative permit, the only effect of the legislative grant of exclusive privilege was, to impliedly prohibit all other persons, thereafter, from making and selling gas in competition with it. The "exclusive grant" to the old company, therefore, while disguised in the form of an affirmative grant, was really not a grant; but was a statute making it unlawful for *others* to thereafter carry on one of the ordinary and useful business occupations of life, in which those others may have been previously engaged.

It meant the same thing as if it had read: All other companies and persons, except the Louisville Gas Company, are forbidden, from this time onward, from exercising the right, they have previously enjoyed, of making and selling gas in the City of Louisville.

Or, it meant the same as if it read: All persons having heretofore had the right to make and sell gas in Louisville, as a common business of life; it is now enacted that hereatter it shall be unlawful for anybody to pursue that ordinary avocation, except only one person, namely, the Louisville Gas Company.

Unless the grant of exclusive privilege had this effect, it had no meaning whatever; for the old company had the right to make and sell gas without the grant; and, giving it the exclusive right has no

meaning, except as an implied prohibition to others from engaging in the same business.

The question then is: Had the Legislature of Kentucky the right to make the ordinary and lawful avocation of making and selling gas an unlawful act, by implication; by saying that the old company alone should have the exclusive right to do so thereafter; or, in other words, had the Legislature the power to destroy competition in one of the businesses of life, which before was open to all citizens?

The authorities—especially the more recent ones—we believe, without variance, hold that a State Legislature has no power, under American Constitutions and principles of liberty, to thus expressly or impliedly make a lawful occupation unlawful to every one except a chosen favorite; unless the business be of such an unwholesome or dangerous character, that the Legislature, under the exercise of the *Police Power*, may, for the public good, prohibit its being carried on.

To prohibit all but one favored individual from engaging in a business which is lawful is, unless under legitimate exercise of the Police Power, a "denying to others of equal privileges," and a "depriving of them of their rights of property," and of their "liberty;" in the meaning of the American Constitutions.

The fifth Amendment to the United States Constitution provides that

"No person shall be deprived of life, liberty, or property, without due process of law."

And the fourteenth Amendment requires that

"No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

The Bill of Rights of the Kentucky Constitution provides:

"Section 1. That all freemen, when they form a social compact, are *equal*, and that no man, or set of men, are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services."

Section two provides "That absolute arbitrary power over the lives, liberty, and property of freemen exists nowhere in a Republic."

Section three provides "That the right of property is before, and higher, than any constitutional sanction."

Section twelve provides "That no one shall be deprived of life, liberty, or

property, unless by the judgment of his peers, and the law of the land." (Ky. Constit., Art. XIII.)

Construing these clauses of these constitutions, it has been uniformly held that no State Legislature can allow one person, and prohibit another, from engaging in any lawful pursuit: unless that pursuit be of an unwholesome or dangerous character, and, therefore, be one which the Legislature, in the exercise of its Police Power, may prohibit from being carried on altogether, or prohibit from being carried on by all but certain licensed or selected persons.

In other words, the right to prohibit all but one person from engaging in any lawful trade is, under our constitutions, only allowable as an exercise of the Police Power of the State; and, unless the business be one which, from its dangerous or unwholesome nature, comes properly under the police power, the monopoly or exclusive privilege to one, and prohibition of others from engaging in it, is void.

Thus, in Cooley on Constitutional Limitations, fifth edition, pages 343–4–5, under the head of "Monopolies and Exclusive Privileges," it is said:

"Where the grant of an exclusive privilege is of a franchise which would *not otherwise exist*, no question can be made of the right of the State to make it exclusive, unless the Constitution of the State forbids it; because, in contemplation of law, no one is wronged when he is excluded from that to which he never had any right. An exclusive right to build and maintain a toll-bridge, or set up a ferry, may therefore be granted.

"And the State may doubtless *limit*, by the requirement of a license, the number of persons who shall be allowed to engage in employments, the entry upon which is not a matter of common right, and which, because of their liability to abuse, may require special and extraordinary police supervision. The business of selling intoxicating drinks, and setting up a lottery, are examples of such employments.

"But the grant of a monopoly in one of the ordinary and necessary occupations of life must be as equally illegal in this country as in England; and it would be impossible to defend or sustain it, except on the broad ground that the Legislature may regulate the ordinary employments even to the extent of fixing the prices of labor and commodities! As no one pretends that the Legislature possesses such a power, and as its exercise would be wholly inconsistent with regulated liberty, it must follow that all grants and special privileges must be confined to cases where they would take from citizens generally nothing which before pertained to them as of common right."

In a note to the above sentence, Judge Cooley says:

"In the Slaughter-house case (16 Wallace, 36), the grant of an exclusive privilege in slaughtering cattle in the vicinity of New Orleans was upheld, as an exercise of the *police power*."

The same learned author (page 745), in speaking of the Police Power of the State, says:

"The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right can not be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, from offering their services in lawful business, or to subject others to penalties for employing them."

It will be observed that Judge Cooley classifies the two kinds of exclusive privileges, as we do, into first, an exclusive privilege to perform a governmental function; and, second, a *prohibition*, under the *Police Power*, against all but one named or licensed person carrying on a business which affects the public health or welfare. And he says all other attempts to prevent competition are invasions of constitutional guarantees, and void.

In Cooley's Constitutional Limitations (5th Edition, page 486), the learned author says:

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights and privileges or legal capacities in any manner before unknown to the law could be sustained; notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended. * * * And if the Legislature should undertake to provide that persons following some specific lawful trade or employment should not have capacity to make contracts or receive conveyances, or build such houses as others are allowed to erect, or in any other way to make such use of their property as was permissible to others, it could scarcely be doubted that the act would transcend the due bounds of legislative power; even though no expressed constitutional provision could be pointed out with which it would come in conflict. To forbid an individual, or a class, the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of *liberty*, in particulars of primary importance to their pursuit of happiness."

In the matter of Jacobs (40 N. Y. Supreme C. R., 378) the Legislature passed an act by which the manufacture of cigars was prohibited in tenement houses. The Supreme Court held the act void, saying that it could not be justified as a police regulation, and

"It is not constitutionally competent for the Legislature to deprive, by any arbitrary enactment, a laborer in any lawful avocation of his right to work and enjoy the fruits of his work in his own residence and in his own way; *except for the purpose of police* and health regulations, as hereinafter considered. An arbitrary law, for the mere purpose of such deprivation, is absolutely dead at its birth, by force of the constitutions of the State."

The syllabus of that case (which embraces the pith of the decision) is as follows:

"The term 'property' as used in section of the constitution, providing that no person shall be deprived of life, liberty, or property without due process of law, includes the right of a person to work and employ his labor to his own best interest and advantage. The Legislature can not, by an arbitrary enactment, deprive a laborer in any lawful avocation of his rights to work and enjoy the fruits of his work in his own residence, and in his own way, except for purposes of police or health regulation. An act so depriving a person of his right to his own labor can not be sustained by simply inserting the declaration that it was passed as a *police regulation*, and to preserve the public health or safety. It must, *in fact*, be such a regulation, and have been passed for that purpose, and not for some other and different purpose."

On an appeal in that case, the Court of Appeals of New York, (98 N. Y., 99) sustained the lower Court in holding the act void. The Appellate Court said:

"So, too, one may be deprived of his 'liberty' and his constitutional rights thereto violated, without any actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, or imprisonment, or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood; to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in the choice of a trade or profession, or confine him to working or living in a specified locality, or exclude him from his own house or residence, or otherwise lawful demands—*except* such laws as may be passed in the exercise, by the Legislature, of the *Police Power*, which will be noticed hereafter—are infringements upon his fundamental rights of liberty, which are under constitutional protection."

It will be observed that the Court there held that a prohibition of others from carrying on a business of manufacturing tobacco was not valid as an exercise of the Police Power, and, therefore, was absolutely void.

Unless the manufacture of gas stands on a different footing from the manufacture of tobacco, and so affects the public health and wel-

fare as to justify the application of the Police Power, the exclusive privilege in this case—which is, in effect, a prohibition against others from carrying on the manufacture—would fall, by the same principle.

In People v. Marks (32 Albany Law Journal, 6), to be reported in 99 or 100 N. Y., the Legislature passed an act to prohibit anybody from engaging in the business of manufacturing or selling oleomargarine.

The Legislature did not simply pass a police regulation requiring them to label it as oleomargarine, so as to prevent fraud or deceit, but absolutely prohibited the manufacture and sale of the material.

The Court of Appeals of New York held the act unconstitutional, because it prohibited citizens from engaging in a lawful business, and because it was not justifiable as an exercise of the Police Power.

The Court said:

"Under these constitutional safeguards, no proposition is more firmly settled than that it is one of the fundamental rights of every American citizen to adopt and follow such lawful industrial pursuit as is not injurious to the community, as he may see fit. The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen or from bodily incarceration; but it is meant to embrace the right of a man to be free in the enjoyment of faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. * * * Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry, for the sole reason that it competes with another, and may reduce the profits of an article of food for the human race? * * * Illustrations might be indefinitely multiplied of the evils which would result from legislation which would exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition. We can not doubt that such legislation is as violative of the letter as well as the spirit of the constitutional provisions above referred to."

In State v. Addington (77 Mo., 110), Hawthorne v. People (109, 111, 311), legislative acts, with respect to oleomargarine, were held to be constitutional. But the distinction is clear between those and the New York case. In the New York case the prohibition was against the manufacture and sale of the material altogether. In the Missouri and Illinois cases the prohibition was against the fraudulent sale of it as and for genuine butter; which was a proper exercise of the police power; for no one has the right to perpetrate a fraud; and the Legislature has the right to prevent such perpetration with respect to articles of food under the police power.

In the Missouri case (77 Mo., 110), the Court said:

"We may make broad concession that the State can not, under the *disguise* of the *police power*, overthrow the rights which the constitution guarantees."

All of these Courts agreed on this: That, unless the acts were such as could be justified under the exercise of the "*police power*" of the State, they would, unquestionably, be void as infringing upon the rights of citizens to engage in useful occupations. The Court which held they were *not* exercises of the *police power* held them void. The Courts that held that they *were* valid exercises of the *police power* sustained them.

In Commonwealth v. Bacon (13 Bush., 212), the Kentucky Legislature passed an act incorporating the Bourbon County Agricultural Society; and, by its charter, provided that such corporation should have the exclusive privilege of keeping livery stables within three hundred yards of its grounds. The Court of Appeals held the act unconstitutional, saying:

"Counsel intimate the enforcement of the act is necessary to sustain the society, and that as it is an institution of interest and benefit to the general public, this attempt to give it a monopoly may be sustained upon the principle upon which the grant of ferry privileges, such as the interdiction of lateral roads near to turnpikes and the sales of articles marketed in cities and towns at places other than those designated by law, are upheld.

"It is the duty of the Government to establish and maintain highways. Ferries are parts of highways, and the Government may perform its duty in establishing and maintaining them through the agency of individuals or corporations; and such agencies are the representatives of the Government and perform, for it, a part of its functions. And, in consideration of the services thus performed, the Government may prohibit altogether persons from keeping ferries and competing with those it has licensed. The establishment of public highways, being a function of Government, no person has a right to establish such highways without the consent of the Government; and hence, in prohibiting unlicensed persons from keeping a ferry, the Government does not invade the rights of even those who own the soil on both sides of the stream. * * Laws and ordinances prohibiting the sale of certain articles marketed in cities and towns, except in designated places, are *mere police regulations*, enacted in the interest of the public. If they were enacted merely for the purpose of compelling dealers in such articles to rent their stalls in the market house in order to swell the rent rolls of the owners, they would be analogous to the act under discussion."

It will be observed that this Kentucky case recognized that an exclusive privilege could only be granted in respect to either a ferry or

other "*governmental prerogative*," and that others could not be prohibited from carrying on industrial enterprises, except by means of the exercise of the *Police Power*.

In the Norwich Gas Light Company case, 25 Conn., 19, the old company had a grant of the "exclusive right" to make and lay gas pipes in the streets of the City of Norwich. Afterward, a new company was incorporated by the Legislature, and was authorized to lay pipes in the streets of Norwich. The old company sought to enjoin the new company, on the ground that the new company's charter "impaired its contract right to the exclusive privilege." The Court sustained the new company in a very elaborate opinion. The Court said, page 36:

"Has, then, the amendment to the plaintiffs' charter the effect of conferring on them an exclusive property franchise in the streets and public places of the City of Norwich for the purpose of laying gas pipes, through which to distribute gas? The plaintiffs insist that it has this effect, and they say it confers on them a franchise similar in all respects to the franchise which is sometimes granted to a ferry or bridge corporation, prohibiting any other ferry or bridge within certain specified limits.

"A franchise is defined by Blackstone to be a royal privilege or branch of the crown prerogative subsisting in the hands of a subject. Being derived from the Government, it is always supposed to have been originally granted by the Government. * * * As this is a species of property granted from the Government, it follows that, if the Government has no power to make the grant, either because it is contrary to public policy, or because the Government had no title to the thing granted, no title will be conveyed to the grantee. This grant appears to have been made without any consideration for it. The plaintiffs are under no obligation to make gas or to suffer the gas which they may make to be used. They are restricted in the price of what they do sell, but there is no provision that they shall sell at all, or to any one who may apply for it, or to as many as they may be able to accommodate. In this respect there is a broad distinction between this and the grant of a bridge or ferry franchise. * * * Again, it is the duty as well as the prerogative of the Government to provide necessary and convenient roads and bridges, and to enable it to accomplish this object it has everywhere what is called the right of eminent domain, the right over individual estates, to resume them for this and other public purposes. Such a prerogative, connected with the corresponding duty, with the power to execute it, by the exercise of the right of eminent domain, necessarily implies that it belongs to the Government to determine what improvements are of sufficient importance to justify the exercise of the right, and when and how it shall be exercised; and if a particular bridge or ferry is considered sufficient for a particular locality, it may stipulate that, within such reasonable limits, the particular bridge or ferry tolls shall not be diminished by any other improvement of the sort. But it is no part of the duty of the Government to provide

the community with lights in their dwellings any more than it is to provide them with the dwellings themselves, or any of the necessaries or luxuries which may be deemed important to the comfort or convenience of the community; and if it be assumed that there would be no impropriety in the lighting of the streets under the control and direction of the sovereign power, this would be merely *as a regulation of Police* and an incident to provide *safe* and convenient ways. * * * As, then, no consideration whatever, either of a public or private character, was reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather or any other article of trade, in respect of which the Government has no exclusive prerogative, we think that, so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes can fairly be viewed as intended to operate as a restriction upon the free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free Government is opposed to such grants; and it does not require even the aid which may be derived from our Bill of Rights (the first one of which declares that 'no man or set of men' is entitled to exclusive public emoluments or privileges from the community') to render them void."

This case is quoted approvingly in Cooley's Const. Lim., page 486, and in Dillon's Mun. Corp., sections 693, 694.

In Adam Smith's Wealth of Nations it is said:

"The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and valuable. The patrimony of the poor man lies in the strength and dexterity of his hands; and to hinder him from employing his strength and dexterity in what manner he thinks proper, without injuring his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment against the just liberty both of the workman and those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the other from employing whom they think proper."

A French edict by Louis XVI., issued in 1776, declared,

"God, in giving to men wants and desires, rendering labor necessary for their satisfaction, conferred the right of labor on all men; and this property is the first, most sacred, and imprescriptible of all."

"What is 'property?' One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things is, in my opinion, destroying property of a most valuable description. The *business* of a merchant is about the most valuable kind of 'property' that he can well have;

and, therefore, to be injured in his *business* is to be injured in his *property*." (Dixon v. Holden, Law Reports, 7th Equity, 492.)

In the Slaughter-House cases (16 Wallace, 116 and 122), Mr. Judge Bradley said, in his dissenting opinion:

"This right to choose one's own calling is an essential part of that 'liberty' which it is the right of Government to protect; and a calling, when chosen, is a man's 'property' and right. Liberty and property are not protected where these rights are arbitrarily assailed. In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, deprives them of liberty as well as property without due process of law. Their right of choice is their liberty. Their occupation is their property."

In Live Stock v. Crescent City (1 Abbott's Circuit Court Reports, 398), Mr. Justice Bradley said:

"It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit; without unreasonable regulation or molestation. There is no more sacred right of citizenship than the right to pursue, unmolested, a lawful employment in a lawful manner. It is nothing more than the sacred right of liberty."

In Arrowsmith v. Burlingame (4 McLean, 497), it is said:

"A freeman may buy and sell at his pleasure. This right is not of society, but of nature. He never gave it up. It would be amusing to see a man hunting through our law books for authority to buy or sell, or make a bargain."

In Bertholf v. O'Reilly (74 New York, 515), it is said:

"The right to live includes the right of the individual to his body in its completeness, and without dismembership. The right of 'liberty' includes the right to acquire, possess, and enjoy, in any way consistent with the equal rights of others, and the just exactions and demands of the State."

In Butchers' Union Co. v. Crescent City Co., 111 U. S., 746, Mr. Justice Field, in his concurring opinion, says that among the inalienable rights, as proclaimed in the Declaration of Independence,

"Is the right of men to pursue any lawful business or avocation, in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties, so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves and have been followed in all communities from time immemorial, must therefore be free, in this country, to all alike, upon the

same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of freedom which they claim as their birthright."

In the same case Mr. Justice Bradley said:

"I hold that the liberty of pursuit, and right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States, of which he can not be deprived without invading his right to 'liberty' within the meaning of the Constitution."

It having been shown that the grant to the old company of the "exclusive privilege" of making gas in Louisville is, in effect, simply a *prohibition* against everybody else in Louisville engaging in the business of making and selling gas, it follows, under the principles and authorities above cited, that, unless such a prohibition is sustainable as an exercise of the *Police Power*, it is unconstitutional and void.

We have already quoted the authorities to the effect that the making of gas is not a governmental function, but is one of the business occupations in which the citizens of the country have the right to exercise their talents, compete, and earn their livings.

Whether the making of gas is one of those occupations with respect to which the Legislature may properly exercise the police power, in prohibiting it from being carried on altogether, or in prohibiting all but certain named persons from carrying it on, is a question on which the authorities differ.

The only case that we know of which has sustained an *exclusive* privilege of manufacturing and selling gas is the case of State v. Milwaukee Gas Co., 29 Wisconsin, 454.

The Court there sustained the exclusive grant of the privilege to make and sell gas, on the ground that it was a proper exercise of the police power, or, as the Court said, "to protect the good order, general safety, and welfare." But the Court was careful to say:

"Of course, the whole matter, under our Constitution, is under the control of the Legislature, which can take from defendants this exclusive privilege whenever it sees fit to do so. The public concern in having some competition in supplying gas is by no means without a remedy. It can appeal to the Legislature to withdraw this exclusive right which it has conferred upon the defendant, and it is but fair to presume that whenever the monopoly becomes oppressive the Legislature will repeal this exclusive privilege which it has granted.

At all events, it is sufficient to say that the remedy is with the Legislature, which has ample authority to do whatever is for the best interests of the City of Milwaukee. The Legislature retains control over such charters in this State, and it has authority to take away any exclusive privilege or franchise which it may have improvidently granted."

Other Courts have held that the making and selling of gas is not an unwholesome and dangerous occupation, and that an exclusive privilege to make it can not be sustained, even under the Police Power. (See Norwich Gas Light Co., 25 Conn., 37; The St. Louis Gas Co., case 19, Central Law Journal, 201, Missouri appeal cases; Paterson Gas Co. v. Brady, 3 Dutcher's N. J. R., 248; New Jersey Gas Co. v. Dwight, 29 New Jersey Equity, 248.)

The Missouri case is so strictly in point that we will quote it here.

There, there was a grant to the old gas company in St. Louis, similar to the one at bar, of the exclusive privilege of making and selling gas in St. Louis. Afterward, there seems to have been a new company incorporated, with the right to make and sell gas there. The Court of Appeals of Missouri held the exclusive grant void, saying:

"Such rights of laboring for the production of property require no grant from the sovereign, but are the common property of all citizens. This equality of right, with exemption from all disparaging and partial enactments in the lawful pursuits of life throughout the whole country, is the distinguished privilege of the citizens of the United States. To them, everywhere, all pursuits, all the vocations, all professions, are open, without restrictions other than such as are imposed equally on all others of the same sex, age, and condition.

"What, then, is the necessary effect when the State undertakes to confer upon one person or corporation the sole and exclusive privilege of pursuing a lawful calling, labor, or occupation in the manufacture or sale of any commodity. The first visible effect is that all persons other than the grantee are directly forbidden to pursue that calling, labor, or occupation.

"Here is no franchise within the definitions given. The privilege conferred and withheld is not one which can not be exercised without a legislative grant and it is one which belongs to the citizens of a country generally by common right. The persons deprived are not in the situation of one who is only excluded from that to which he never had any right. They have always been, and still should be, entitled as of natural and unquestionable right. There is no grant of anything from the State's prerogative; no protection given to an exclusive ownership already vested; nothing pretended to be done for the preservation of public health, morals, or safety. The act is sustained by no elemental power confided to the Government by the Constitution or other authority, and comes within the technical definition of a monopoly. A monopoly is defined to be an institution or allowance from the sovereign power

of the State by grant, permission, or otherwise, to any person or corporation for the sale—buying, selling, making, working, or using anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any liberty they had before or needed in their lawful trade. All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities.

"From what has been said, the conclusion naturally follows that so much of the plaintiff's charter as attempts to grant an exclusive privilege of making or vending an illuminating gas in the city of St. Louis is void, and can not be judicially enforced. No reasonable distinction can be entertained between illuminating gas as an article of manufacture and trade, and any other commodity which the people may purchase for their personal comfort and convenience. Such a distinction has never been recognized judicially, unless in its strict relation to the use of public streets for the conveying of the article through pipes, or to the lighting of streets by municipal authority for the public benefit. So much of the charter as grants an exclusive right to the use of the streets of the city for the laying of pipes to convey illuminating gas was the lawful exercise of the power vested in the General Assembly, and was and is effectual for the time being. Whether it must continue to be effectual under all the circumstances until the expiration of the plaintiff's charter depends upon other considerations. As the case stands, we are not called upon to determine whether the grant concerning the streets was shaped into a contract from which the State can not recede, so as to bestow like privileges upon parties other than the first grantees. Adjudications are not wanting to the effect that grants strongly resembling that claimed by the plaintiff are lacking in the essentials of a contract, and whose tendencies suggest, at least, that the city might, through its municipal agencies, still assert its control over the streets to the extent of permitting a competitive enjoyment by another of the same privileges conferred upon the plaintiff."

Counsel for the old gas company seem to have recognized that the grant could only be sustained under the Police Power, and hence, in their petition for a re hearing, in the Kentucky Court of Appeals (which petition will be found printed in the record herein, on pages 67 to 92 inclusive), while they do not say in express terms that their grant rests on the police power, they do use the following language, Record, page 78:

"The Court knows that a very large amount of business is transacted in the city of Louisville during the night time, and that the hours of recreation of its ordinary working, commercial, professional, and manufacturing community are after the sun has ceased to give its light; also, that a large portion of the pas-

senger traffic passes through the streets, transferred from one depot to the other, during the hours of night. The gas on the streets and in the depots is absolutely necessary for the *safe* and convenient discharge of all these duties, services, and employments, and for lawful amusements. * * * "

Again they say, Record, 79:

"Gas is absolutely essential to the *safety* of the streets. Remove the gas-posts and gas-lights, and our highways would become the scene of the operation of *robbers, thieves, and thugs* and no one could be *safe* in passing along them Commerce would be subject to the profession of the *vicious* classes of a metropolitan population, and *life itself would be exposed to the continual hazard of violence*. We boldly assert it is the duty of the Government, by its own agents or through the medium of individuals or corporations, to provide for the *safety* of the streets and the *security* of life and property. And we do not hesitate to say that, upon the principle of *safety* to the community and benefit to the public, it would be the duty of the Government to place lights on all the highways of the State were it necessary to do so to secure the *safety of life and property* or the transaction of the business of the country."

On the same page they say:

"The people, in the transaction and prosecution of their business, or in the lawful indulgence of their right to seek their churches and places of amusement, or in the no less important discharge of sacred duties and obligations, are compelled to use the streets of the city at night. With entire respect we urge that it is the right and duty of the Government to see that the streets are made *safe and secure* for all these purposes and lawful uses of the community."

And on page 81 they say:

"To our minds, we have established the proposition that the lighting of the streets of Louisville and public places, and other services rendered for said city, were an absolute public necessity; that the public *welfare* demands them."

All four of the judges of the Kentucky Court of Appeals in their opinions in this case seem to have recognized the correctness of the principle that we contend for; namely, that the granting of an exclusive privilege of making gas can be sustained, if at all, *only* under the exercise of the *police power*.

The opinion of Judge Hines, in which the then Chief-Justice Hargis apparently concurred, held that the exclusive privilege was void, because the manufacture of gas is on no different footing from "other occupations and business," and therefore was not a proper subject of prohibition under the police power. (Record, 65.)

The opinion of Judge Pryor, in which Judge Lewis apparently con-

curred (Record, 66), held that there was a neces-ity for gas-light upon the streets, and they, therefore, evidently considered that it was proper for the police power to control the manufacture of gas, for the public safety.

It follows that the grant of the exclusive privilege to the old company was unconstitutional and void; unless it was an exercise of the *Police Power*.

If, then, this Court should be of opinion that this exclusive grant or prohibition was not an exercise of the Police Power, it should, we submit, declare it *void*.

If it holds that it was a proper grant under the Police Power, then, as we shall now endeavor to show, it could be repealed at any time.

II.

The grant to the old company, in 1869, *of the exclusive privilege of making and selling gas in Louisville was, in effect, a prohibition against others making and selling gas there; and such prohibition was the exercise of the Police Power of the State, and, as such, it was, like all other exercises of the Police Power, subject to repeal, in whole or in part, as succeeding Legislatures might think the public good required.*

Two principles are involved in the above proposition. First, that the grant of the exclusive privilege of making and selling gas is an exercise of the Police Power; second, that such a legislative act, like all such exercises of the Police Power, can be repealed, in whole or in part, when succeeding Legislatures consider that the changing public needs require such repeal. We will consider these in their order.

1. *The grant of the exclusive privilege of making and selling gas was an exercise of the Police Power.*

The exclusive privilege was not an exclusive privilege to use the *streets*, or lay gas pipes thereon, but was:

> "The exclusive privilege of erecting and establishing gas-works in the City of Louisville during the continuation of this charter, and of vending coal-gas lights, and supplying the city and citizens with gas, by means of Public works."

The grant of the right to open the *streets* of the city, and to lay down pipes therein, was made under the original charter of 1867, section seven, and that section did not make the right to lay the pipes *exclusive*, nor give any exclusive rights whatsoever with regard to pipes

or streets; and a mere grant of a right to lay pipes in a street will not be treated as an exclusive grant unless words of exclusiveness be express and unmistakable. (11 Peters, 420; 100 U. S., 561.)

Thus, in People v. Bowen (30 Barbour, 38), where there was a similar grant to a gas company of "the right to lay its pipes in the streets," but no words of exclusiveness, the Court said:

> "The resolution of the two Boards of Common Council granting permission to the defendants to use the streets, etc., contains a simple permission to lay pipes for the purpose of conducting gas through the streets, etc., for the period of thirty years. There is nothing *exclusive* in the permission, and not even an assurance or guaranty that the like permission would not be given to another company, or an individual the next day."

See to the same effect, that a grant of an easement, franchise, or privilege, with respect to the use of streets or other highways, will be construed strictly against the corporations, and will not be treated as exclusive, unless words of exclusion are explicit and "unequivocal." "Silence is negation, and a doubt is fatal to the claim." (Charles River Bridge v. Warren Bridge, 11 Peters, 420; High on Injunctions, section 901; Lehigh Water Co.'s Appeal, 102 Pennsylvania State, 527; Holyoke v. Lyman, 15 Wall. 512; Fertilizer Co. v. Hyde, 97 U. S., 666; 101 U. S., 796.)

See State v. Cincinnati Gas-Light Company, 18 Ohio State, 290–1, and Norwich v. Norwich Gas Company, 25 Conn., for illustrations of attempts to give the *exclusive* privilege of laying *pipes* in the *streets*, both of which, however, were held void.

We have already seen that the making and selling of gas is not a governmental function; and that it is not, like operating railroads, ferries, bridges, etc., a pursuit which the State has the exclusive privilege of engaging in; and which exclusive privilege, therefore, the State may lend to a company without interfering thereby with the previous rights or liberties of others. (See *ante*, page 7.)

We have also seen that the business of making and selling gas is one in which every citizen has the right to engage without legislative permission or grant, subject only to the police regulations. (*Ante*, page 8.)

We have also seen that the grant of exclusive privilege to one person or company to thereafter engage in such an ordinary manufacturing pursuit, which the grantee already had the right to engage in, together with all others, could have no other meaning or effect than a

prohibition against *others* thereafter carrying on the business of making and selling gas. (*Ante*, page 8.)

Before the prohibition implied by this exclusive grant to the old company, there might have been two, three, or a dozen individuals or corporations engaged in the business of making and selling gas in Louisville. The prohibition or exclusive privilege to one company, if valid, would, of course, at once have rendered the property of those persons, acquired for the purpose of their business, valueless, and would have cut them off in the pursuit of, perhaps, the only business they were fitted to engage or prosper in.

And, if such an exclusive privilege or prohibition can be granted to one person or company, a grant in the future to some still newer company, incorporated after the present exclusive privilege expires, would have the effect of preventing both the present old and new companies from carrying on their business, and of destroying their property.

To authorize the Legislature to thus destroy the property, curtail the liberty of labor, and to shut off freedom of pursuit and competition in a previously open business, presupposes the exercise of some very extraordinary governmental power. That power, as we have seen, does not exist under our free and Constitutional Government, unless it be the "Police Power." (*Ante*, page 10.)

What, then, is this Police Power?

In the License Cases (5 Howard, 583), Chief-Justice Taney said:

> "But what are the Police Powers of the State? They are nothing more or less than the powers of the Government, inherent in every sovereignty to the extent of its dominions; and whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits—in every case it exercises the same power, that is to say, the power of sovereignty; the power to govern the men and things within the limits of its dominions. It is by virtue of this power that it legislates."

In the Slaughter-House Cases (16 Wallace, 62), this Court, quoting from Chancellor Kent, defined the Police Power as embracing:

> "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of gunpowder, the application of steam-power to the propelling of cars, the building with combustible material, and the burial of the dead."

And in Butchers' Union Company v. Crescent City Company (111

U. S., 750), this Court defined the Police Power as being "the power to regulate unwholesome trades, slaughter-houses, operations offensive to the senses," and as embracing the power to regulate things which may operate to the prejudice of the "general welfare," or "public health or public morals." And in that case, page 751, this Court further defined it as embracing the duty:

"Of guarding by suitable laws the *health* of its citizens, especially in crowded cities, and the protection of their personal property by suppressing and preventing crime."

And on page 752 this Court, in the same case, said that it embraced "legislation for the public welfare."

In Barbee v. Connelly (113 U. S., 31,) this Court defines the Police Power as

"The power of the State to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

And, in Soon Hing v. Crowley, 113 U. S., 703, the Police Power was held to embrace laws made "to prevent dangerous occupations from being carried on, except at particular times and in particular ways."

We submit the following considerations and authorities, showing that the exclusive grant was an exercise of the Police Power for the protection of the health and morals of the city and its inhabitants.

Coal gas is both a deadly poison and a terrific explosive. The law reports are full of actions for damages by reason of persons being poisoned to death, or for life and property destroyed by the explosions or fires caused by coal-gas. And the statutes of the State abound with police regulation of gas companies as dangerous instrumentalities.

Beside, the prohibition of gas in a city, if accompanied by the grant of the right to lay pipes through the public streets, involves a tearing up of those streets from time to time. This involves not only a serious disruption of the highways, and the injury and expense in repairing them, but the health of the people suffers from the malarious exhalations of the upturned dirt, and also from leaks in the pipes, if they are laid at unwholesome times or by irresponsible parties. "Health, life, and property" may thus be vitally imperiled by the exercise of the dangerous occupation of making and selling gas.

Again, gas-light, in superseding previous forms of street and other lighting, is a powerful moral agent in the community.

Criminals fear light. The notorious "Five-Points" of New York were regenerated by the introduction of gas-light. Burglars, footpads, courtesans, and thugs flourish in the dark, and are dissipated by light like noxious vapors. A city's morals are dependent upon its lighting. Policing can only be done by light. The chief method of preventing banks from being burglarized is not by watchmen, but by leaving gas lights burning inside the building and around the vaults. Unless, therefore, the distribution of gas is kept out of the hands of improper persons, and kept in the hands of responsible persons, the public health may suffer by foul gas, by poor manufacture, bad pipes, corroding materials, explosions, fires, asphyxia, ruined eyesight, and diseased lungs. And the public morals may suffer from murders, robbers, prostitution, burglaries, and other crimes, which flourish in the dark.

The old gas company, in its petition for a rehearing herein (record 78–81 inclusive), clearly shows all this. There, as we have seen (*ante* page 20), among other things, it says:

"The gas is absolutely essential to the *safety* of the streets. Remove the gas-posts and gas-lights, and our highways would become the prey of *robbers, thieves,* and *thugs,* and no one could be *safe* in passing along them. Commerce would be subject to the depredations of the *vicious* classes of a metropolitan population; and *life* itself would be exposed to the continual *hazard* of violence. * * * To our minds we have established the proposition that the lighting of the streets of Louisville and public places, and other services to the said city, are an absolute public necessity—that the public *welfare* demands them."

Macaulay, in his history of England, Vol. I., page 281, speaking of the year 1688, says:

"When the evening closed, the difficulty and *danger* of walking about London became serious, indeed. Falls, bruises, and *broken bones* were of constant occurrence. For, until the last year of the reign of Charles II., most of the streets were left in profound darkness. *Thieves* and *robbers* plied their trade with impunity. * * * There was an act of the common council which provided that more than a thousand watchmen (police) should be constantly on the alert in the city from sunset to sunrise, and that every inhabitant should take his turn of duty. In the last year of the reign of Charles II. began a great change in the *police* of London—a change which has, perhaps, added as much to the happiness of the great body of the people as revolutions of much greater fame. * * * Those who now see the capital all the year around, from dusk to dawn, blazing with a splendor in comparison with which the illu-

minations of La Hogue and Blenheim would look poor, may smile to think of Henning's lanterns, which glimmered before one house in ten, during a small part of one night in three. But such was not the feeling of his contemporaries."

Macaulay there shows that the "*police*" power was first exerted to compel watchmen to watch in London, and, afterward, that *gas*-lights performed, in a great measure, this "*police*" duty.

In Harlem Gas Company v. Mayor of New York (33 N. Y., 327,) the Court said:

"In our northern latitudes, when darkness prevails over half the twenty-four hours for a large part of the year, light diffused through the public streets and avenues is a predominant and urgent necessity which no well-governed city can do without. This beneficent application of artificial lights is one of the distinguishing characteristics between the cities of modern times and those of the middle ages, when darkness reigned supreme for no inconsiderable portion of the time, broken only to become more visible by the occasional torch of the link-boy or the lantern of the solitary watchman. The modern gas-light, diffusing its rays over every part of the public thoroughfare, is a source of pleasure, comfort, and convenience, as well as a *security against crime* and disorder which no other agency can supply. It is indispensable at all times, and no municipality can be said to be well governed which is not able to command its presence under all circumstances."

In Weller v. Philadelphia (77 Pa. St., 354), the Court, speaking of supplying the citizens of Philadelphia with gas and water, say:

"The *health* and comfort of large communities are promoted by it."

In Clark v. New Orleans Gas Company (95 U. S., 652), this Court, in sustaining the validity of bonds issued to establish a gas-works, said that the gas company was "employed by the city in the construction of works needed for the *health*, comfort, and convenience of its citizens," and "to advance the public good."

In the Encyclopædia Brittanica (9th Edition, Vol. 19, page 279), in the article entitled "Poisons," and subdivision "Gaseous Poisons," it is said:

"Coal gas is an asphyxiant, and narcotic. The appearances met with after death, though more especially in the fluid state of the blood, are similar to those observed after death from carbonic oxide gas, which is a constituent of coal gas, and to which the chief of coal gas is due."

And speaking of carbonic oxide, on the same page, it is said:

"An atmosphere containing less than one per cent. of carbonic oxide would, doubtless, be fatal if breathed for many minutes."

The same encyclopedia, in its article on "Gas," page 102, speaks of "the foul odors which attach to the works, the yet more offensive exhalations given off from the streets through which the main pipes are laid, the destructive accidents which occasionally occur from gas explosions, and the continual and sulphurous fumes evolved during its combustion."

In State v. Gas Company (34 Ohio St., 581), where there was an exclusive grant to the gas company of the right to manufacture and sell gas for twenty years in Columbus, the Court said that the grant was for the promotion of the "public convenience and *welfare*."

In State v. Cincinnati Gas-Light Gas Company (18 Ohio State, 293), in discussing the grant of an exclusive privilege of running gas-pipes through the streets of Cincinnati, and holding it to be void, the Court showed that if such exclusive right could be granted to one person by prohibiting others, it could only be done "for *police* purposes."

In Williams v. Gas Company (52 Mich., 502), it was held that the operation of a gas works "may seriously affect the *public policy*, and the individual convenience of the community."

In Barbier v. Connelly (113 U. S., 31), where an order was upheld prohibiting washing and ironing within certain limits, between ten at night and six in the morning, this Court said, that under the power of the State, sometimes termed its "police power," to "prescribe regulations to promote the health, peace, morals," etc.:

"Special burdens are often necessary for general benefits; for supplying water, preventing fires, *lighting* districts, cleaning streets, opening parks, and many other objects. * * * * This is a matter for the determination of the municipality, in the exercise of its police powers."

In the St. Louis Gas Company case (19 Central Law Journal, 201; 15 Mo. Appeal Cases), a grant of an exclusive privilege to make and sell gas in the city of St. Louis was held to be an exercise of the *police power* of the State, and as such it was said that it could be repealed at any time.

In City of Norwich against the Norwich Gas Company (25 Conn., 37), the Court said:

That if an exclusive grant to a gas company of the right to use the streets and highways of a city were valid at all, it would be merely "as a regulation of *police*, or incident to the duty to provide safe and convenient ways."

Gas-works, and the operation of making and selling gas, will be found largely treated of in all works on "Nuisances;" and nuisances are, peculiarly, subjects for the exercise of the police power.

In Broadbent v. The Imperial Gas Company (7 De Gex, McNorton & Gordon, 467), it was shown that gas-works, and the operation of making and selling gas, are very liable to become a nuisance and injure the health, and property, and lives of citizens. The Lord Chancellor said:

"I do not want chemists or scientific people to tell me that that must be injurious. If it were not so, nature would have provided somehow or other that the supply of this mixture (of gas) or something equivalent to it, should always be at hand. It is difficult to express a doubt about it."

In Cleveland v. The Citizens Gas-Light Company (20 N. J. Chancery Reports), the Court showed that a gas-works, if not properly managed, was a most dangerous nuisance both on account of the danger of explosion, and the danger to life and health from the gases, etc.

The result of the principles and of the authority of all these cases is, that the manufacture and sale of gas is a "dangerous and unwholesome trade," and "an operation offensive to the senses" and a matter which "may seriously affect the public health and morals," if not properly conducted and controlled under the "police power" of the State.

And, if we look to analogies, we will find that grants of exclusive privileges in other lines of business that may be injurious, if improperly conducted, are based upon the police power, and sustained only in this way.

In People v. Thompson (30 Hun., N. Y., 460), the grant of the exclusive privilege of planting oyster beds in a navigable stream was held to be "simply a police regulation; at most, an exercise of the police power."

In 35 La. Annual, 1114, the grant to a water company of the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, by means of pipes, conduits, and hydrants, was held to be "in the exercise of the police power."

In 23 La. Annual, 741, City of New Orleans v. Hoyle, it was held that a grant of the "exclusive privilege of keeping powder magazines

in the borders of the State of Louisiana" was an exercise of the "police" power.

In Commonwealth v. Bacon (13 Bush., Ky., 212-3), the grant to a fair association of the exclusive privilege of keeping livery-stables within three hundred yards of their grounds, by prohibiting other persons from keeping stables there, was sought to be sustained by counsel only as a police regulation, in the same line as laws for the prohibition of the sale of articles marketed in cities and towns at places other than those designated by law. The Court said:

"Laws and ordinances prohibiting the sale of certain articles in cities and towns, except at designated places, are mere police regulations."

In Cooley's Constitutional Limitations, under the head of "Police Power," page 743-4, the learned author says:

"So, the most proper business may be regulated under this police power, to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous; and rules for the conduct of the most common and necessary occupations are prescribed, when, from their natures, they afford peculiar opportunities for imposition and fraud."

And he instances the prohibition of the "sale of provisions except at certain places and under certain regulations" as instances of the exercise of the Police Power for the protection of the public health.

In Gale vs. Kalamazoo, 23 Mich., 344, the grant to a particular person, by a city, of the exclusive right for ten years to conduct a market house in the city was held to be sustainable, if at all, only as an exercise of the police power for the public welfare.

The Court there does not expressly say that the power is the police power, but they speak of it as the legislative power conferred, in order to be exercised again and again, as may be found needful and politic.

In Green v. City of Savannah, 6 Ga., 1, it was held that a law forbidding the carrying on of the *business* of growing rice in a city was sustainable as an exercise of the police power, the Court saying:

"It was a mere police regulation for the protection of the *health* of the city."

In "*re* Ruth," 32 Iowa, 250, the prohibition of carrying on the business of selling liquor was held to be an exercise of the "police power," because the carrying on of that business might affect the public health or morals; and in Bartemeyer v. Iowa, 18 Wall., 132, affirmed in 97 U. S., 33, this Court held that a law permitting the carrying on

of the business of selling liquor was sustainable only on the ground of its falling within "the police regulations of the State."

It is impossible to distinguish between those cases of the prohibition of the sale of poisonous liquor, and the prohibition of the sale of poisonous and explosive gas.

In Patterson v. Kentucky, 97 U. S., 504, it was held that a statute which forbade the selling of coal oil in Kentucky, except under certain specified circumstances by which a large number of persons were prevented from selling their coal oil, was held to be an exercise of the "police power," because of the tendency of coal oil (similarly to the tendency of gas) to *explode* and to create conflagrations when improperly handled, etc. The Court said:

"By the settled doctrines of this Court, the police power extends at least to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights."

In 109 Illinois, 311, and 77 Missouri, 110, a prohibition of the sale of oleomargarine, except in certain restricted ways, was sustained only as an exercise of the "police power."

The prohibition of the carrying on business on Sunday is sustained only as "a mere exercise of the police regulation." (City v. Benjamin, 2 Strobhart, 530.)

In Columbus v. Cutcomb, 61 Iowa, 673, and the many cases cited there, it was held that a grant of a license to sell liquors

"Is not a contract between the State and the person licensed, giving the latter vested rights, and partaking of the nature of contracts, but a mere temporary permit to do that which otherwise would be an offense, issued in the exercise of the police power."

In Clark v. The City of South Bend, 85 Indiana, 278, it was held that a law prohibiting the carrying on of the business of storing straw in a city, except in a fire-proof enclosure, was an exercise of the "police power."

In Richmond R. R. v. Railroad, 96 U. S., 521, it was held that the prohibition of the use of steam power on the streets, being liable to explode, was an exercise of the "police power."

In all those cases, the prohibitions against the carrying on of business that might prove injurious to the health or morals of the community were the same in principle as the prohibition against others carrying on the business of making and selling gas, under the "exclusive" act of 1869.

But the most analogous cases to the one at bar are those in relation to slaughter-houses and powder magazines—the one of which, like gas, is dangerous by reason of its noxious odors and emanations, and the other by reason of its explosive character.

We have already seen that the grant of an exclusive right to keep a powder magazine is an exercise of the police power. (23 La. Ann., 741.)

In 1869, the Legislature of Louisiana incorporated the Crescent City Slaughtering-House Company, and gave to it the exclusive privilege to keep a slaughter-house and slaughter animals in New Orleans for a period of twenty-five years. The Court of Appeals of Louisiana, in State v. Fagan, 22 La., 555, sustained the "exclusive privilege," or rather the prohibition against all others except that company slaughtering thereafter, on the ground, and the only ground, that the grant of the exclusive privilege or prohibition was the "exercise of the police power of the State." The case was appealed to this Court, under the name of the "Slaughter-house cases," and the exclusive privilege was sustained expressly and only on the ground that it was "an exercise of the police power." (16 Wallace, 62.)

Afterward, that exclusive privilege of slaughtering cattle came up again before this Court in Butchers' Union v. Crescent City, 113 U. S., 747, and this Court again said that the grant of the exclusive privilege was sustained in 16 Wallace upon the express ground that it was "an exercise of the police power."

In New Orleans Water Works Co. v. St. Tammany Water Works Co., 14 F. R., 194, the grant of an "exclusive privilege" to a water works company was held to be "an exercise of the police power of the State;" and it was said that the grant of exclusive privilege to the water works was on the same footing as the grant of exclusive privilege to the slaughter-house company, and that the two cases were "identical in principle."

Now, in Spring Valley Water Co. v. Schottler, 110 U. S., 353, this Court speaks of water companies, gas companies, and other companies of like character; thus putting gas companies on the same footing as water companies, which, as we have seen, are on the same footing as slaughter-house companies. (See also 19 Wallace, 676, 677.)

So, likewise, in People v. Stevens, 62 Cal., 233. the Court put water companies and gas companies on the same footing, and speak of them as "the great public uses of water and gas."

And this Court, in Barbier v. Connelly, 113 U. S., 31, speaks of

the "police power" as applying in the same manner to the occupations of "supplying water, preventing fires, *lighting* districts, cleaning streets, etc."

We therefore submit that the grant to the old company of the exclusive privilege of making and selling gas in Louisville (being in effect a prohibition against every one else engaging in that business) was an exercise of the police power of the State, in the interest of the public health or public morals.

2. *The said grant of an exclusive privilege or prohibition, being an exercise of the Police Power for the public health or morals, could be repealed, in whole or in part, when any succeeding Legislature should consider that the changing public needs required such repeal.*

The Kentucky Legislature, being clothed with the governmental powers, among which was that known as the Police Power, had the right, as we have seen, to prohibit the manufacture or sale of any kind of articles in Louisville which it was of opinion might prove injurious to the public health or morals. It could, therefore, prohibit the sale of liquor, or oleomargarine, or diseased meat or milk (which may injure the health); and it could prohibit the sale of gunpowder and dynamite or inflammable coal oil (which are explosives), and it could prohibit the sale of opium (which is a poison); and it could prohibit the manufacture and sale of gas, which is *both an explosive and a poison.*

And, as it could prohibit any one whatever from selling any of those articles, or manufacturing any of them, so likewise it could prohibit all but one from doing so; because the power to prohibit all involves the power to prohibit all but one. And the prohibiting of all but one from selling such articles is what is commonly, but inaccurately, called the "grant of the exclusive privilege" to that one. This act of 1869 was, therefore, equivalent, as we have seen, to an act which should say that all persons in Louisville who were or were not then engaged in the manufacture and sale of gas should thenceforth cease to manufacture and sell it, except the Louisville Gas Company.

That Legislature of 1869, perhaps, thought it would operate better for the public health or morals if but one company made and distributed gas in Louisville. It may have thought it best not to have too many companies tearing up the streets and laying pipes, which process involves loss to the city, and danger to the health of the city from the

damp and poisonous earth which is exposed to the air in closely-settled streets. That Legislature of 1869 may also have thought that the danger of explosions from gas would be less if the old company alone had charge of the matter, than if some new and untried company should also be allowed to deliver gas in the city. That Legislature may also have thought that the old company would make a purer and better gas, by which the poisonous vapors which are in all gas would be diminished and less likely to poison and impair the health of the citizens, and by which the eye-sight of book-keepers, newspaper men, and professional men, type-setters, and other night-workers would be preserved and their general health protected. And it may have been influenced by a personal confidence in the then officers of the old company.

But that Legislature of 1869 was succeeded by the Legislature of 1870, with equal powers; and that Legislature was succeeded, in its turn, by still another Legislature, that of 1872.

That new Legislature of 1872 seems to have been of opinion that the public health or morals of the city of Louisville had not been adequately protected by that former exercise of the police power, and were not being properly preserved by the manner in which the old company was acting; and that the public health and morals would be best promoted by permitting another gas company to make and sell gas in Louisville. It also, probably, was influenced by the fact that the city had developed and grown since 1869, and also, perhaps, by the fact that the old company had undergone such changes in its management or otherwise as to no longer furnish a good quality of gas, and to no longer furnish gas at a reasonable price. Or that Legislature of 1872, perhaps, was of the opinion that it was best to have competition in gas, as in other articles; which always compels the parties to make their goods better, and to put them at a lower price, so as to stand the competition.

Or, the Legislature of 1872 may have been of the opinion that the new kind of gas, known as "water gas," was better than the "coal gas" which the old company was making; and, therefore, that a new company should be provided, with a charter broad enough to enable it to make *water* gas.

The Legislature of 1872, therefore, passed an act incorporating the Citizens'-Gas-Light Company, and giving it the right to make and sell gas, and to lay pipes in the streets of Louisville for that purpose; which act was approved March 21, 1872, and is in the record, pages 13 to 17.

By that act it, in effect, said that so much of the act of 1869 as prohibited everybody from making and selling gas, except the Louisville Gas Company, should be repealed, so far as to permit the new company also to make and sell gas.

Whatever may have been the reasons which influenced the Legislature of 1872 in determining there should be two gas companies in Louisville, it is certain that the Legislature of 1872 had as much right to determine how many gas companies there should be in Louisville as the Legislature of 1869 had.

That Legislature of 1872 had as much right to say there should be two companies furnishing gas in Louisville as the Legislature of 1869 had to say there should be one.

If it was within the police power of the Legislature of 1869 to prohibit everybody selling gas in Louisville except one person, it was equally within the power of the Legislature of 1872 to prohibit every one from selling it; or, to prohibit all but two or three companies from selling it.

Unless the Legislature of 1872 had the power to do this, then the Legislature of 1869 did not possess it. In short, the right to prohibit the sale of gas being an exercise of the police power, it follows that a subsequent act of the Legislature, repealing the prohibition, is equally an exercise of the police power, and equally valid.

The best illustrations of the truth of this is furnished by the cases with respect to the water company, powder company, and slaughter-house, monopolies of Louisiana.

In 1869 (the same year in which this monoply was fastened on Louisville), the Legislature of Louisiana, as we have seen, under the exercise of the police power, granted to one company the exclusive privilege of slaughtering cattle in New Orleans. (State v. Fagan, 22 La. Annual, 545; slaughter-house cases, 16 Otto, 62.)

In 1879, the Constitutional Convention of Louisiana passed an ordinance, or act, by which it was provided that "the monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

The Supreme Court of Louisiana, in 1881, in Crescent City Slaughtering Company v. New Orleans, etc. (33 La. Annual, 934), held:

"1. That the said grant of exclusive privilege was clearly within the police power of the State, and was a valid and legal enactment of the General Assembly.

"2. But such an act of the Legislature can not bind the State. The rights therein granted are revocable, at the will of the sovereign, and the grantee holds nothing, indeed, but a license, subject to abrogation by future constitutional and even legislative action. Further:

"3. Such a charter does not create a contract between the State and the grantee, protected from impairment by the Constitution of the United States."

The Court based its decision upon the previous decisions of this Court in Miss. Lottery case (101 U. S., 814); the Mass. Beer Company case (97 U. S., 25), and the Illinois Fertilizing case (97 U. S., 501).

The same question was likewise brought up before the Circuit Court of the United States at New Orleans; but that Court, differing from the Supreme Court of Louisiana, held that the exclusive privilege created a contract, and that the repeal was void, as an impairment of such contract. (Crescent City Company v. Butchers' Union Company, 9 Fed. R., 743.)

On appeal to this Court, the whole matter was considered, and the syllabus of the opinion of this Court is as follows:

"The power of the State Legislature to make a contract of such a character that, under the provisions of the Constitution, it can not be modified or abrogated, does not extend to subjects affecting the public health or morals, so as to limit the future exercises of legislative power on those subjects to the prejudice of the general welfare." (Butchers' Union Slaughter Company v. Crescent City Company, 111 U. S., 746.)

This Court there said (111 U. S., 749, etc.), that the monopoly act of 1869 had been "accepted by the Crescent City Company, and so far acted on that a very large amount of money was expended in a vast slaughter-house and an equally extensive stock-yard and landing-place;" and the Court said that "no one could examine the act and hesitate to pronounce that in form it has all the elements of a contract, on sufficient consideration."

The Court further said that the subsequent repealing act "impaired the supposed obligation by taking away the exclusive grant of the company, granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract."

The Court then said that the argument in favor of the validity of

the repeal "did not deny the power of the Legislature to give an exclusive privilege, for the time being," to a particular person or persons, or corporation, but

"It does deny the power of that Legislature to continue this right, so that no future Legislature, or even the same body, can repeal it, or modify it, or grant the same privileges to others. It concedes that such a law, so long as it remains on the statute books as the latest expression of the legislative will, is a valid law and must be obeyed, which is all that was decided by this Court in the slaughter-house cases. (16 Wall.) But it asserts the right of the Legislature to *repeal* such a statute, and to make a new one inconsistent with it whenever, in the wisdom of this Legislature, it is for the good of the public it should be done."

The Court further said:

"The denial of this power, in the present instance, rests upon the ground that the power of the Legislature intended to be sustained is one so indispensable to the public welfare that it can not be bartered away by contract. It is that well-known, but undefined, power called the Police Power. * * * While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced it can not, by any contract, limit the exercise of those powers to the prejudice of the general welfare. * * * These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

"It can not be permitted that when the Constitution of the State—the fundamental law of the land—has imposed upon the Legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their persons and property by the suppression and preventing of crime, that the power which enables it to perform this duty can be sold or bargained away, under any circumstances, as if it were a mere privilege which the Legislature could dispose of at its pleasure. * * * We are not prepared to admit that it is competent for one Legislature, by any contract with an individual, to restrain the power of a subsequent Legislature to legislate for the public welfare. * * * Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. The Legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi suprema lex*,' and they are to be attained and provided for by such appropriate means as the legislative discretion may

devise. That discretion can no more be bargained away than the power itself. * * *

"No Legislature can bargain away the public health or the public morals; the people themselves can not do it, much less their servants. The supervision of both of these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them. For this purpose the legislative discretion is allowed, and the discretion can not be parted with any more than the power itself."

If the Legislature can not contract away the right to repeal laws made under its police power with respect to slaughter-houses, which simply create unhealthy odors, certainly the Legislature can not contract away the right to change the laws which it may make respecting the manufacture and sale of gas, which may not only produce deadly and noxious and poisonous vapors, but is also liable to create deadly explosions and disastrous conflagrations, and to produce obstructions, expense, and sickness, by the tearing up of the streets.

In Beer Company v. Massachusetts (97 U. S., 25), the Legislature of Massachusetts created a corporation, and gave to it the right "to manufacture malt liquors in all their varieties."

This company built a large establishment, and invested large sums of money, for the purpose of manufacturing malt liquors.

Afterwards, a law was passed prohibiting the manufacture or sale of malt liquors in Massachusetts.

The corporation contended that the grant in its charter of the right to make malt liquors, and its acceptance of that charter, and spending immense sums of money in reliance thereon, created a contract with the State, which subsequent act of repeal impaired.

The Supreme Court of Massachusetts held that the original grant, and the repeal thereof, were but successive exercises of the police power, and that the Legislature had no power to make a contract which could not be repealed by succeeding Legislatures. The case was appealed to this Court, which affirmed the case, saying:

"The plaintiff in error (the Beer Company) was incorporated for the purpose of manufacturing malt liquors in all their varieties, it is true; and the right to manufacture, undoubtedly, as plaintiff's counsel contend, included the incidental right to dispose of the liquors manufactured. But, although, this right or capacity was thus granted, in the most unqualified form, it can not be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquors, nor as exempting the corporation of any control

therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals required the discontinuance of any manufacture or traffic, the hand of the Legislature can not be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. * * The Legislature had no power to confer any such rights. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature can not, by any contract, divest itself of the power to provide for these objects."

In Fertilizing Company v. Hyde Park (97 U. S., 667), the Legislature of Illinois incorporated the Hyde Park Fertilizing Company, and, by its charter, gave it the authority to "manufacture and convert dead animals and other animal matter into an agricultural fertilizer," and to "establish and maintain depots in the city of Chicago for the purpose of receiving and carrying off offal, dead animals," etc. The company was organized, in reliance on this grant, and expended large sums of money in building a works for the purpose. In 1869, two years after the enactment of said charter and grant, the Legislature of Illinois passed another act, in effect, repealing the rights of said company and forbidding it, under penalty, to carry on its works in Chicago any longer.

The Fertilizing Company contended that the said grant constituted a contract, which the subsequent repealing act impaired. The Supreme Court of Illinois held the repealing act to be valid, as an exercise of the police power, and this Court affirmed its decision, saying (97 U. S., 667):

"We can not doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the State when the Federal Constitution was adopted. They did not surrender it, and they all have it now. * * The charter was a sufficient license until revoked. But we can not regard it as a contract, guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future by reason of the growth of population around it."

Mr. Justice Strong dissented, and said in his dissenting opinion, in effect (page 679), that it was on the same footing as if the Legislature should charter a gas company, and authorize the manufacture of

gas at a designated price, and should then pass a law withdrawing the grant, because it considered the operation of the gas-works as offensive, and a nuisance; thus showing that the opinion of the majority in that case is applicable to the case now at bar.

In Newton v. Commissioners (100 U. S., 561), that Fertilizing Company case was approved. There a legislative act of Ohio provided that in consideration of five thousand dollars to be raised by the citizens of Canfield and applied to erecting public buildings, and the donation by the citizens of that town of a suitable lot of ground on which to erect the public buildings, the county-seat of Mahoney county should be "*permanently* established" in that town.

The citizens of Canfield raised the money and furnished the lot and built the houses. Afterward, the Legislature passed an act by which it moved the county-seat from Canfield to Youngstown. The inhabitants of Canfield contended that the first legislative act created a contract, for valuable consideration, which was impaired by the subsequent act.

This Court held that the Legislature had no authority to make such a contract, and that the repealing act was valid. It said (100 U. S., 558), quoting from a case in 10 Howard:

"The parties to this grant did not by their charter stand in the attitude toward each other of making a contract by it, such as was contemplated in the constitution, and so could not be modified by subsequent legislation. The Legislature was acting here on the one part, and the public municipal corporations on the other. They were acting, too, in reference to a public object. * * * From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the Legislature, therefore, as to this must be considered rather as public laws than as contracts. They relate to public interests; they may change as the interests demand. * * *

"In all these cases there can be no contract and no irrepealable law, because they are governmental subjects, and hence in the category before stated. They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding Legislature possesses the same jurisdiction and power with respect to them as its predecessor. The latter have the same power of repeal and modification which the former had of enactment; neither more nor less. All occupy in this respect a footing of perfect equality. This must necessarily be so, in the nature of things. It is vital to the public welfare that each should be able at all times to do whatever the varying circumstances and present exigencies touching the subject may require. A different result would be fraught with evil."

In Stone v. Mississippi (101 U. S., 814), the Legislature of Missis-

sippi incorporated the Mississippi Agricultural Society, and in its charter gave it the right to operate a lottery for the purpose of raising money to conduct it.

Subsequently, the Legislature passed an act repealing the grant of all lotteries in the State. The corporation claimed that the grant in its charter of the right to operate lotteries had been accepted and acted upon by the investment of large sums of money by it, and that it created a contract, which the subsequent repeal impaired.

The Supreme Court of Mississippi held that there was no contract, but that both the grant and the repeal were exercises of the police power, and both were valid.

This Court affirmed the decision, saying:

"All agree that the Legislature can not bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State. But no Legislature can curtail the powers of successors to make such laws as they may deem proper in matters of policy. No Legislature can bargain away the public health or the public morals; the people themselves can not do it, much less their servants. The supervision of both of these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself. * * * But the power of governing is a trust committed by the people to the Government, no part of which can be granted away. The people in their sovereign capacity have established their agencies for the preservation of public health and public morals, and for the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they can not give away nor sell the discretion of those who are to act after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances. They may create corporations, and give to them, so to speak, a limited citizenship; but as citizens, limited in their privileges or otherwise, these creatures of the Government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. Contracts which the Constitution protects are those which relate to property rights, not governmental.

"All that one gets by such a contract is the suspension of certain governmental rights in his favor, subject to withdrawal at will. He has, in legal effect, nothing more than a license to enjoy the privilege, on the terms named, for the specific time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative or constitutional control or withdrawal."

In Cooley's Constitutional Limitations, 149, it is said:

"To say that the Legislature may pass irrepealable laws is to say that it may alter the very Constitution from which it derives its authority; since, so far as one Legislature could bind a subsequent one by its enactments, it could, in the same degree, reduce the legislative power of its successors; and the process might be repeated, until one by one the subjects of legislation would be excluded altogether from their control."

Judge Cooley, on page 342, says:

"It has also been intimated, in a very able opinion, that the police power of the State could not be alienated, even by express grant; and this opinion is supported by those cases where it has been held that licenses to make a useful product in certain modes may be revoked by the State, notwithstanding they may be connected with grants, and based upon a consideration."

In a note to this section, the author says:

"A merchant's license may be revoked, by a police regulation inconsistent with it. In short, the State can not, by any legislation, irrevocably embarrass itself in the exercise of the police power."

On page 710, the learned author refers to that provision of the Constitution of the United States which forbids State laws impairing the obligation of contracts, and says that it has no application to acts passed under the exercise of the police power of the State.

The learned Mr. Greenleaf, in a note to his edition on Real Property (Vol. II., page 67), said, with respect to police powers:

"Powers of the former class are essential to the constitution of society, as without them no political community can well exist, and necessity requires that they should continue unimpaired. They are entrusted to the Legislature to be exercised, not to be bartered away; and it is indispensable that each Legislature should assemble with the same measure of sovereign power which was held by its predecessors."

In the case of St. Louis Gas Company (19 Central Law Journal, 201, 15 Mo. Appeal Cases), where there was a grant of an exclusive privilege to the old company, of making and selling gas and laying pipes in the streets, and there was afterward a new corporation created and organized and authorized to make and sell gas there, the Court said:

"As the case stands, we are not called upon to determine whether the grant concerning the streets was shaped into a contract, from which the State can not

recede so as to bestow like privileges upon parties other than the first grantee. Adjudications are not wanting to the effect that grants, strongly resembling that claimed by the plaintiff, are lacking in the essentials of a contract, and whose tendencies suggest, at least, that the State might, through its municipal agencies, still assert its control over streets, to the extent of permitting a competitive enjoyment by another of the same privileges conferred upon the plaintiff."

In Colder v. Kirby (5 Grey, 598), where the sale of liquors was generally prohibited, but there was a grant to a party of a license to retail spirituous liquors for one year, for a valuable consideration, and a statute was passed, within the year, prohibiting all sales of liquors, it was held that the grant of the license, for a valuable consideration, was not a contract, and that the license could be repealed at any time.

The Court said that the grant of the privilege of selling was

"A mere police regulation, intended to regulate trade, and prevent injurious practices, and promote the good order and welfare of the community, and liable to be modified or repealed whenever, in the judgment of the Legislature, it failed to accomplish these objects."

The same thing was held in Columbus v. Cutcomb (61 Iowa, 673), where it was said that such grants were "issued in the exercise of the police powers, and subject to the direction of the Government, which may revoke them as it deems fit."

In Wood, on Nuisances, section 51, it is said that "all monopolies were regarded as *nuisances* at common law;" and in section 598, and note thereto, he classed gas-works with slaughter companies and fertilizing companies, which are always subject to legislative control.

In Commonwealth v. Intoxicating Liquors (115 Mass., 155), where the plaintiff was incorporated with a provision in its charter authorizing it to manufacture and sell liquors, the Court said:

"But the authority of the Legislature over the property or the use of the property of a corporation is not lost because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact regulating, controlling, restricting, or prohibiting the sale of a particular kind of property for the general benefit, applies as well to the property of corporations, like the plaintiff, as individuals. Such laws are in the nature of police regulations; and individuals and corporations are alike subject to them. * * * * They are presumed to be passed for the common good, and to be necessary for the protection of the public; and can not be said to impair any right, or the obligation of any contract, or to do any injury, in the proper and legal sense of these terms."

In Richmond Gas-Light Company v. Middletown (59 N. Y., 228), the Legislature, in 1865, passed an act authorizing the Board of Auditors of a town to cause the streets of the town to be lighted with gas, and to enter into a contract with the Richmond Gas Company for that purpose. The Board of Trustees, in pursuance of that act, made a contract with the gas company to furnish gas to the city for a term of five years, at a fixed price.

The next year, 1866, before the five years elapsed, the Legislature passed an act repealing the law upon which the contract was based. The gas company contended that the repeal of the law impaired the obligation of the contract. The Court held that the repealing act was valid, saying:

"If the Board of Town Auditors could deprive the Legislature of this power (that of repeal), for five years, by entering into a contract with the plaintiff for that time, it might for a hundred years, by contracting for that period. I think it entirely clear that no such power was conferred by the act upon the town auditors. The power so conferred was, like other powers, conferred upon the officers of this and other towns of the State, subject to modification or repeal, by subsequent legislation; and the town auditors could not, by any contract, prevent, or at all control, the action of the Legislature in this respect."

In Bancroft v. Thayer (5 Sawyer, 502), the Oregon Legislature enacted that the county superintendents of the common schools should adopt text-books by vote, and that the text-books so adopted should be *exclusively* used for the period of four years thereafter. The county superintendents voted in favor of a series of text-books published by Bancroft & Co., and, thereupon, the committee entered into a contract with Bancroft & Co. to furnish the books for four years. Afterward, and before the four years expired, the Legislature passed an act repealing the said clause which required the books, so contracted for, to be "exclusively" used. The publishers contended that this repealing act impaired the obligation of their contract. The Court held that the whole matter was an exercise of the police power of the State, and that the repealing act was valid.

The Court said:

"But, in all this, there is no power to contract or bind the State beyond the power of its revocation. * * Such a law would be nothing more than a regulation which the State imposed upon itself, in the person of its secretary, and which, by the agency of its law-making power (the Legislature), it could change or abrogate at pleasure. * * It is thought better that individuals should occasionally suffer from the mistakes of public officers or agents, than to adopt a

rule which, through improper combinations or collusions, might be changed to the detriment or injury of the public."

In Gale v. Kalamazoo (23 Michigan, 354), a village contracted with Gale that, in consideration of his building a market-house for the village, it would allow him the rents of the market-house for ten years, and would not permit any other market-house to be operated in the village. In other words, it gave to Gale the exclusive privilege of operating a market-house in the town. The Court, through Mr. Justice Cooley, said that such a contract could be revoked or repealed at any time, saying:

"If a municipal corporation can preclude itself in this manner from establishing markets, where they may think it desirable, or from abolishing them, where they are found undesirable, it may also have the right to agree that it will not open streets, or grade or pave such as are opened, or introduce water for the supply of its citizens, except from some specified source, or buy fire-engines of any other than some stipulated kind, or contract for any public work, except with *persons named*. * * For, if the village might confine itself to one market-house for ten years, it might do so for all time to come. * * Indeed, it is impossible to predicate the reasonableness of any contract by which the government authority abrogates any of its legislative powers, and precludes itself from meeting, in the proper way, the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits, or diminish their efficacy, but must transmit them, unimpaired, to their successors.

"This is one of the fundamental maxims of government, and it is impossible that a free government, with restrictions for the protection of individual and municipal rights, could last long without its recognition."

In City of New Orleans v. Hoyle, etc. (23 Louisiana Annual, 741), where there was a grant of the exclusive privilege of storing powder, it was held that the exclusive privilege, being an exercise of the police power, could be repealed at any time, by any succeeding Legislature, under an exercise of the police power.

In New Orleans Water Company v. St. Tammany Company (14 Fed. R., 199), where there was a grant of an exclusive privilege to furnish water for New Orleans, the Court say:

"Counsel argue that the question of supplying the inhabitants of a great city with water was one arising under, and under the control of, the police power, and, therefore, could not be the subject of a contract, within the protection of the Federal Constitution. This proposition may be taken for granted."

In Louisville City Railway Company v. City of Louisville (8 Bush, 416), the Court held (syllabus):

"Municipal corporations have no power to limit their legislative discretion by covenant. They may contract as individuals, but their legislative enactments must, of necessity, have the same effect upon their individual contracts as upon those of other persons, artificial or natural, or of the general public. The city can not refuse to exercise its powers to regulate and control its streets and highways where the public necessity and convenience demand that it shall be done. Nor can the city be allowed to excuse its failure in this respect upon the ground that it has, by contract, deprived itself of the right to act."

In Western Savings Fund v. Philadelphia (31 Pa. St., 182), the Court said:

"We see no reason why a municipal corporation, which may be created and destroyed by the State at pleasure, should stand upon a higher or better footing than its own creator. Like the State, it has public duties and it has private rights. It has no right to enter into a contract which interferes with its duty to preserve the health and morals of the city. It should, moreover, defeat the title of its own grantee when it becomes necessary to do so in order to abate a nuisance or preserve the public health. * * * A corporation, acting for the benefit of others, has no power to enter into a contract which would prevent it from performing its public duties. Every right derived from it is held subject to the restriction that it shall be so exercised as not to injure others. Upon this principle, if the gas-works should become a nuisance, affecting the public health and comfort of the neighborhood, the city council, notwithstanding their own lease of the ground, would have the right to direct the removal of the works to a place where they would be less injurious to the public."

As far back as Gosler v. Georgetown (6 Wheaton, 593), it was held that the power to grade the streets was a continuing power, and that it could not be bargained away by contract, the Court, by Chief Justice Marshall, saying:

"We rather think the corporation can not abridge its own legislative power."

In Stone v. Mississippi (101 U. S., 814), speaking of the effects of the police power upon contracts and charters, this Court said:

"In this connection, it is to be borne in mind that it is not the *charter* which is protected, but only any *contract* the charter may contain."

In Stone v. Mississippi (101 U. S., 819), the distinction is shown between the cases under the Police Power and the famous "Dartmouth College case." The Court there shows that Chief-Justice Mar-

shall, in the Dartmouth College case, expressly disclaimed that his opinion was intended to apply to grants made under the police power, and his opinion is there quoted from to that effect.

In short, it is now the settled rule that "the police power can not be bartered away," and that an act of the Legislature, passed in pursuance of the police power, or based upon it, is not a "contract" in the meaning of the Federal Constitution.

In like manner, it has been held that the power of Eminent Domain "can not be contracted away" by the Legislature. (Cooley on Constitutional Limitations, pp. 341, 649; Mills on Eminent Domain, sec. 40, 42.)

This Court has held that the power of taxation may, to a limited degree, be contracted away, but only over most vigorous dissents. And in Stone v. Mississippi (101 U. S., 820), the distinction is shown between the police power and the power of taxation. It is there shown that while taxation

"Is in general necessary for the support of the Government, it is not a *part* of the Government itself. Government was not organized for the purpose of taxation, but taxation may become necessary for the purposes of the Government. As such, taxation becomes *incidental* to the exercise of the legitimate functions of the Government, but nothing more."

But the Court there say that the police power is the very power of governing itself, no part of which can be bargained away.

The good sense of the principles we have here contended for could not be better illustrated than in this case of an exclusive grant to a gas company.

Suppose the old gas company were sustained in its claim of an irrepealable exclusive privilege, and freedom from all future competition, then it may, upon the same principle, obtain a renewal of the exclusive privilege for the next twenty-five years, or fifty years, or a thousand years; thus preventing the city of Louisville from ever having any competition, and from ever having better or cheaper gas secured by competition. Suppose, then, the old company were to make such gas as would injure the public health during the period of its charter, could no other company be incorporated? Suppose its works became so obsolete and old-fashioned, or that its product should be far inferior to the gas of other cities, could the Legislature give no relief to the citizens? Suppose the old company becomes insolvent, what is

the city to do with the exclusive privilege? Suppose the old works burn down, and the old company is slow in rebuilding? Suppose "coal-gas" goes entirely out of fashion, and water-gas, or some other new form of gas, or some new form of coal-gas even, comes into vogue, which the works of the old company are not fitted to make, is there to be no relief? and is Louisville to be held back behind all other cities having the new and superior lights? Suppose the city grows so that the old company does not furnish an adequate supply? Suppose the quality of the old company's gas, from the decay of its old works, becomes injurious to the eyes or lungs or furniture? Suppose the pipes of the old company become rusted out, and necessitate perpetual tearing up of the streets, and continual bad odors from leaks result, can there be no new company established to relieve the people?

Again, if the right exists to give the exclusive privilege of lighting the city to a gas company, then it existed equally to give the exclusive privilege of lighting the city to a lamp company, or a candle company. Suppose, now, many years ago, before gas was invented, there had been the grant of an exclusive privilege to a company of "lighting the city," and it chose to light the city only with candles or lamps!

Suppose, now, there was another grant made of the exclusive right of "lighting" the city, accompanied by a statement that it should not be lighted with anything but *coal* gas hereafter. Would the city of Louisville be forever forbidden from having that exclusive grant repealed, in order to let it be lighted by water-gas or the electric lights of the future?

We respectfully submit that the Legislature of 1872 had as much right, in the exercise of its police power, to remove this prohibition against others from making and selling gas in Louisville as the Legislature of 1869 had to impose the prohibition.

The principle for which we have here contended, and which we have elaborated at such length, is a most important one. If we are correct in our views, it may go far toward solving the troublesome question of "monopolies," and may prove a most healthy check upon "log-rolling" and legislative "jobberies."

For, let it be once decided and known that a grant of a monopoly or other job, when "log-rolled" through the Legislature by improper means or otherwise, does not become a sheltered iniquity under the disguise of a "contract," but must stand upon its merits before succeeding Legislatures, and the greatest temptation and inducement will be

taken from the procurers of such questionable "privileges." When it is realized that a job in the form of a "monopoly" or "exclusive privilege," if gotten through the Legislature secretly or otherwise, is not "for all time," but can be rectified, as soon as discovered, by an indignant public, through the next Legislature; a large part of the burdensome, wicked, and insufferable local legislation and "special privileges" which now corrupt Legislatures, swell the statute books, and oppress the people, will cease to be sought for or enacted. The expense of "slipping through" a monopoly or other job in the Legislature will not be gone through, when it is known that, when passed, it will be at the hazard of standing on its merits before the next Legislature, and will be subject to repeal, if found to be iniquitous or against public policy.

The Legislature ought not to grant any "exclusive privileges" or monopolies, except such as, being for the public benefit, can stand on their merits before succeeding Legislatures. Proper and meritorious grants, therefore, have nothing to fear from the operation of the rule we advocate. Oppressive laws, or those that interfere with the equal freedom of others, or which deprive others of their liberty or property, or which forbid them to carry on occupations in competition with legislative favorites, or which deprive them of the equal benefits of the laws will alone suffer; under the healthy rule here submitted, and which has been already established, in a great measure, by the authorities we have quoted.

The grant to the new company, in 1872, of the right to make and sell gas in Louisville was, of course, a repeal, *pro tanto*, of the exclusive privilege of the old company.

The exclusive grant to the old company, being a prohibition against all other companies or persons, was repealed so far as the new company was concerned.

Thus, in City of New Orleans v. Hoyle (23 Louisiana Annual, 740), there was a legislative grant to the plaintiff of the exclusive right to keep powder magazines in the State of Louisiana. There was, afterward, a legislative grant to the defendant of the right to keep powder magazines in said State. The Court held that the said latter act was "to that extent" a repeal, by implication, of the exclusive privilege in the former grant to the plaintiff.

In Butchers' Union Slaughter Co. v. Crescent City Slaughter Co. (111 U. S, 748), there was a grant to the Crescent City Slaughter Company of the exclusive privilege of slaughtering cattle in New Or-

leans. There was, afterward, a grant to the Butchers' Union Company of the privilege of slaughtering cattle in the city of New Orleans. This Court said that

"The grant to the *latter* company, being in utter disregard of the monopoly grant to the Crescent City Company, *in effect repealed* the *exclusive* grant made to that company."

See, also, Johnson v. Crow (87 Pa. St., 187).

III.

The "exclusive privilege," if valid, could be, and was, pro tanto, repealed; under the right reserved to the Legislature, by the Kentucky act of 1856, to amend, alter, or repeal all legislative grants and franchises.

The charter of the old gas company was, as we have seen, granted in 1867, and the amendment containing the exclusive privilege, in 1869.

There was then in full force, in the "Revised Statutes" of Kentucky, the following general law, first enacted February 14, 1856:

"*All charters* and *grants* of or to corporations, or amendments thereof enacted since the 14th day of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be *therein plainly expressed:* Provided, that whilst *privileges* and franchises so granted may be changed or repealed, no amendment or repeal shall impair *other* rights previously vested." (Acts of 1855, page 15; Revised Statutes, Vol. II., page 121; General Statutes, page 616.)

It will be observed that, to take away the legislative power of repealing any grant, the legislative intent to do so must be "expressed," "plainly," "therein."

The old company is compelled to admit that there was nothing in its original charter of 1867 which "plainly" expressed, or expressed at all, that either it, or the privileges granted therein, should be irrepealable.

It contends, however, that there was a section in its amendment of 1869 which "plainly expressed" legislative intention that the grant of the exclusive privilege therein should not be repealable.

That section is as follows:

"SECTION 6. No *alteration* or *amendment* to the *charter* of the gas company shall be made without the concurrence of the *City Council* and the *directors* of the gas company."

The Court of Appeals of Kentucky, construing this general reservation act of 1856, in Griffin v. Kentucky Insurance Company (3 Bush, 592), sustained the absolute repeal and destruction of an insurance company's charter, saying:

"It has become usual for Legislatures in acts of incorporation of private persons to reserve to themselves a power to alter, modify, or repeal the charter at their pleasure; and, as the power of modification and repeal is thus made a qualifying part of the grant of franchises, the exercise of the power can not, of course, impair the obligation of the grant. Sometimes this power is reserved by a general act applicable to all corporations."

In Cumberland & Ohio R. R. v. Barren County (10 Bush, Ky., 608 609), the original charter of the corporation gave it certain rights and powers. A subsequent act "materially modified" those rights. Several provisions of the original charter were relied on by the company as "plainly expressing" that the grants and privileges in the original charter should not be repealable. The Court upheld the repeal, saying:

"It is *difficult* to deduce from any or all of these grants the conclusion that the Legislature *intended* to relinquish the power to alter, amend, or repeal appellant's act of incorporation. There is certainly nothing in the language used, nor in the character of the privileges and franchises granted and conferred, authorizing us to say that the intent to relinquish the power is 'plainly expressed.' It was to protect the State against irrevocable grants of powers, rights, and franchises to private corporations that the provision was made in the act of 1856. * * * * That act was intended to preserve to the State control over *all* acts of incorporation thereafter passed. Experience had demonstrated the propriety of, if not the absolute necessity for, such a reservation of power; and it would *be a manifest disregard of the clearly-expressed will of the Legislature for the Courts to resort to technical rules of construction* or finely-drawn legal implications to escape the effect of the plain declaration that *all* charters and grants to corporations shall be subject to amendment and repeal 'unless a contrary intent be therein *plainly* expressed.'"

In Greenwood v. Freight Company (105 U. S., 20), this Court gave a full history of the purpose of acts like this, showing that they were adopted in accordance with the suggestion thrown out by the Court in the famous Dartmouth College case, and for the purpose of enabling Legislatures to get around and "avoid the effect of the Dartmouth College decision." The Court say:

"A provision in the statute, reserving to the Legislature the right to amend

or repeal, must be held to be a part of the contract itself; and the subsequent exercise of the right would be in accordance with the contract, and could not therefore, impair the obligation."

In that case, this Court sustained an enactment by which the right of a street railway company to a street was repealed so far as to permit another street railway company to run over the same street.

See further, as to the purpose and effect of such reserved rights of amendment or repeal, 15 Wallace, 459–497–522, and 7 Bush, 353.

The broad and general policy of the State being not to make any irrepealable grants, and the right of legislative control being reserved in express, explicit, and unmistakable terms, that right, on general principles of construction, as well as by the very terms of the statute, can only be taken away from the State by a "contrary intent, therein plainly expressed."

In Thornhill v. Hoyle (2 Clark & Finnelly's House of Lords Reports, page 36), Lord Brougham, in rendering the judgment of the Court, said:

"I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed, in one part of an instrument, by terms clear, unambiguous, liable to no doubt, clouded by no obscurity—by terms upon which, if they stood alone, no man breathing, be he lawyer, or be he layman, could entertain a doubt—in order to reverse that opinion, to which the terms would of themselves, and standing alone, have led, it is not sufficient that you should raise a *mist;* it is not sufficient that you should create a *doubt;* it is not sufficient that you should show a *possibility;* it is not even sufficient that you should deal in *probabilities*. But you must show something, in *another* part of that instrument, which is *as decisive* the one way, as the other terms were *decisive* the *other way*, and that the interest *first given* can not be taken away, either by *tacitum*, or by *dubium*, or by *possibile*, or even by *probabile*; but that it must be taken away, and can only be taken away, by *expressum et certum*."

Now, applying that reasoning, the general reservation act of 1856 gave the Legislature the "explicit" right to repeal any grant or privilege that might be given to any corporation; and, in order to take away that right of repeal from the Legislature, the words which forbid the repeal of the particular privilege must be as "decisive" the one way as the reservation was "decisive" the other way. They must not simply "raise a mist," or "create a doubt," or show a "possibility," or suggest "probabilities."

If the Legislature had intended to make this exclusive privilege

irrepealable, it would simply have expressed it in the act by saying that the said exclusive privilege "shall not be repealed." It would have expressed it in the same terms that the general reservation act uses, if it had been intended to repeal that general reservation act, or it would have said that the said general reservation act of 1856 should not be applicable.

Now, we do not find it anywhere "expressly" shown that the intent of the Legislature was that said exclusive privilege should not be repealed. We do not find it anywhere "plainly" "expressed" that it should not be repealed.

We find nothing which alludes to the act of 1856, or its terms, and nothing shows that the Legislature had in its mind the intent to repeal the act of 1856.

Examining critically the section of the act of 1869 which the old company claims plainly expressed the intent to take away the legislative right of repeal, we find, in the first place, it says that no alteration or amendment to the "*charter*" of the gas company should be made. It does not say the exclusive privilege shall not be altered, but the "charter." Does this mean no part of the charter, no section, no word, is ever to be altered or amended by the State? Can it be believed that the Legislature intended to make those twenty or thirty sections of the charter as inviolable as Scripture? By looking over those sections and seeing the details, the public importance of them, etc., it will be seen how far-fetched is the idea that the Legislature intended to take away its own power over the charter for the next twenty years. And yet, if the hands of the Legislature are tied as to this exclusive-privilege clause, they are tied as to every word in the "charter."

In the second place, that section does not say that the *amendment* to the charter should not be repealed. It only says the "charter." It speaks of the charter as an already existing thing; and that "charter," which had been enacted in 1867, had no exclusive clause. If it was to apply to the amendment, then it will apply to all the amendments in the future; for, by the same reasoning they might, when passed, be claimed as a part of the "charter." Certainly the Legislature never intended this.

In the third place, that section only says that the charter shall not be "altered or amended." It does not say that it shall not be *repealed*. Such provisions should be strictly construed. The act of 1856 said the right of "amendment or *repeal*" shall exist unless plainly expressed

therein not to exist. The act of 1869 speaks of "alterations and amendments" but does not plainly or otherwise express anything about *repeal*. If the Legislature were intending to get around the act of 1856, would they not have used the language of that act, and the word "repeal?" The failure to use it shows the Legislature was not intending to affect its rights under the act of 1856.

In the fourth place, that section refers to the "charter" as distinguished from any *grant of privilege*. The "charter" of a corporation is one thing; the subsequent grant of *privilege* is another. This Court has held, in several cases, that the transferring of a charter of one corporation to another may not give to the other any exclusive or special *privileges* which the charter might have contained; such as exemption from taxation, etc. And in Beer Co. v. Mass. (97 U. S., 30), this Court approved the decision of the Supreme Court of Massachusetts, in which the distinction was taken between a provision in a charter granting the *privilege* to sell liquors, and the *charter* itself; and which Court held that a repealing act was "applicable to the *sale* of such property by individuals and corporations, even where the *charter* of the corporation can not be altered or repealed by the Legislature."

A "charter," by which the corporation was held an artificial being, may stand; but the separate, distinct, and entirely detachable exclusive privilege, which is no part of a corporation, and was no part of its original charter, may be repealed.

The reservation act of 1856 makes the distinction between a "charter" and the grant of a "privilege." It speaks of the right to repeal a "charter," and also of the right to repeal a "grant of privileges," as separate things.

In the fifth place, it is apparent from looking at the preamble to the act, that said section six was not intended to bind the *State*; but the gas company and the city council simply asked the Legislature to pass it in that form so that the gas company should not ask an alteration in the absence of the city council, and the city council should not ask an alteration in the absence of the gas company. That preamble recites that there had been an agreement reached between "the city of Louisville and the gas company;" but nowhere recites that there had been any agreement on the part of the *State* to give up its sovereign powers if it should afterward find that the public interests required their exercise.

That section was, probably, aimed at putting on record the arrangements of the rates of prices, the number of street lamps, and

other matters of business, between the city and the gas company. It did not relate to the sovereign powers of the State to legislate for the next twenty years.

The rule of construction of such clauses, by which the sovereign power of the State is sought to be taken away, is thus laid down, in Newton v. Commissioners (100 U. S., 561):

"The contract must be shown to exist; there is no presumption in its favor. Every reasonable doubt should be solved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend either in *scope or duration* beyond what the terms of the concession clearly require. There must have been a deliberate intent clearly manifest on the part of the State to grant what is claimed. Such a purpose can not be inferred from equivocal language. No grant can be raised by a mere inference or presumption, and the right granted must be clearly defined. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the juri-prudence of this Court."

And in Wright v. Nagle (101 U. S., 796):

"Exclusive rights to public franchises are not to be favored. * * * * * Every statute, which takes away from the Legislature its power, will always be construed more strongly in favor of the State. These are elementary principles."

The opinion of the Court of Appeals of Kentucky in this case shows that, under these principles of strict construction, the section relied on by the company does not "plainly express therein" an intent on the part of the Legislature to surrender its sovereign power.

Judge Hines, with whom the then Chief-Justice Hargis seems to have concurred, said (record 65):

"This section was *clearly* not *intended* to be a limitation upon the power of *legislative* repeal, but was intended to regulate the respective rights of the city and the gas company; so that neither, without the consent of the other, could call upon the Legislature to exercise its right of alteration or repeal."

The opinion of Judge Pryor, in which Lewis seems to have concurred (Record, 66), says:

"We concur in the conclusion reached, that this last charter of the appellee is within the operation of the act of 1856."

And the apparently unanimous response of the Court of Appeals to a petition for a rehearing (Record, 99), says that after "a careful

consideration of the questions upon which the affirmance of the case must rest," the Court was

"Satisfied it was not the legislative purpose to surrender all power over the enactment in question. Matters of disagreement were likely to arise between the company and council with reference to the obligations allowed by the company; and for that reason the Legislature, in order to prevent the one from obtaining legislation unfavorable to the other, provided that no alteration or amendment to the charter of the gas company should be made without the concurrence of the city council and the directors of the gas company. The city council might apply to have the price of gas reduced without notice to the company, or to have other legislation ruinous to its interests; therefore, both must be consulted when the one or the other should apply for an amendment.

"It was not intended that the action of the two corporations should constitute the legislative will; and, if the act of 1856 was to be ignored, it would have been an easy task for the Legislature to have said that the act of 1856 should not apply to the new charter. This Court is asked to say that this section of the new charter repeals, by implication, the act of 1856, when it is evident, we think, that such a construction never entered the legislative mind. The power of the Legislature over the charter was never surrendered; and the only purpose of the sixth section was to prevent legislation in behalf of the one corporation without the knowledge of the other. If the company by its charter sought to accomplish such a purpose, it should not have left any room for construction in a matter affecting such vital interests. And we are asked to surrender all legislative control over the subject upon a *doubtful* construction of the statute. This ought not to be done." (Record, 99.)

In Swift v. City of Newport (7 Bush, Ky., 38), a legislative act provided that no memorial or petition to the Legislature for the division of a county, or the establishment of a county, or the change of a county line, or the change of the place for holding any Court or relating to any other local matter, should be received or acted on, unless upon notification to the parties to be affected thereby two months before the meeting of the Legislature.

The Legislature afterward passed an act in violation of that act, without consulting the parties interested. The Court held the repealing act was valid, saying:

"A failure to give the notice would have been a sufficient reason for holding the enactment complained of as *ex parte*, and legislative prudence would have refused to consider the subject of application, for want of notice. But mere indiscretion can not avoid a legislative act. One Legislature can not control the conduct or limit the power of its successor except by an act operating as a binding contract. The statute requiring notice is, therefore, only advisory and prudential, and, being disregarded in this case, was, *quoad hoc*, constructively repealed."

We submit that the act of 1856 was in force in 1872, when the charter of the new company was granted; and that the repeal, *pro tanto*, of the exclusive privilege, was valid.

IV.

The grant of the exclusive privilege herein, if a contract at all, was without any consideration, and, therefore, could be repealed at any time.

1. The charter of the old company was passed in 1867, and it went into effect on the first day of January, 1869. The old company was organized on January 1, 1869, and, having purchased or obtained the works of the previous old company, had continued in business for about a month before the exclusive privilege act was passed by the Legislature. The preamble to the act of January 22, 1869, which granted the monopoly, recited:

"That the city of Louisville and the stockholders of the old Louisville Gas Company *have* accepted the said extended charter," showing that this grant of exclusive privilege was an afterthought.

The Court of Appeals, in its opinion herein (Record, 57), shows the fact to be, that this exclusive privilege was granted "on the 22d of January, 1869, after the charter of 1867 had gone into effect, and after its acceptance by the stockholders of the old company." And, in its opinion, page 65, the Appellate Court further say:

"As already stated, the act of 1867 had been accepted, and was being acted on, at the time of the amendment of 1869."

The grant of the exclusive privilege, therefore, did not have, to support it, the consideration of the company undertaking to afterward organize and purchase property.

The Court of Appeals, in its opinion (Record, 65), say:

"The inviolability of charters rests upon the ground of executed contract, supported by a valuable consideration. Here, then, there was no consideration, for the Louisville Gas Company had *already* accepted the charter, binding it to the performance of the duties imposed by the amendment of 1869."

Counsel for the gas company attempt to claim that the act of 1869 put heavier duties upon the old company, and, therefore, furnished a consideration for the grant of the exclusive privilege. But, as the

Court of Appeals show in their opinion herein (Record, 65), this is inaccurate.

The provisions in the second section of the act of 1869, requiring the company to make extensions "when the private and public lights immediately arising from said extension will pay seven per cent. *profit* on the *cost* thereof," leaves the whole matter practically in the gas company's hands to say when it will *probably* pay seven per cent. profit; and, besides, it is certainly no "burden" to require a company to extend its business when it was to clear seven per cent. profit on the extension—more than the legal rate of interest!

The provision of the third section, providing at what distances apart the street-lamps should be, etc., is a *verbatim* copy of section seven (or eight) of the charter of 1867, except that, while the act of 1867 provided the cost to the city of street-lamps should not "exceed $35.00 per lamp," the amendment of 1869 provided that such cost "shall not exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis," whatever that may mean. Certainly, that vague, indefinite change did not impose any greater "burden" on the gas company!

The first and fourth sections are not in any sense restrictions or burdens on the gas company, but contain only restrictions in favor of the company against the city selling its stock in the gas-works, and by which the company is given the privilege of keeping and using the dividends on the city's stock! Surely, those are not burdens!

There are but three other sections—the fifth, which gives the exclusive privilege to the gas company; the sixth, which, as the company now contends, protects its rights from repeal; and the seventh, which simply provides that the act "shall take effect from its passage." Certainly, none of those impose any "additional burdens" on the gas company!

In short, a critical study of the act of 1867 and 1869 will show that there was not only no additional burden imposed on the gas company, but that the amendment was to its charter and in its favor.

2. Besides, the company, organized under the act of 1867, was entirely under the control of the Legislature; for it is admitted that the charter of 1867 was subject to be altered, amended, or repealed at the pleasure of the Legislature. The Legislature, then, had the clear right to impose all the amendments and alterations contained in the act of 1869, without giving or "contracting" away anything.

It had the right to impose those amendments at its pleasure. It did not have to give the gas company anything therefor; nor did it have to agree or "contract" with the gas company, to get it to obey those amending laws.

Nor was the yielding obedience by the gas company to those laws any "consideration" paid to the State. It is not paying a "consideration" for a party to do that which he is bound to do by law. And the gas company (having accepted the original charter, and having become bound by it, and by the general reservation act of 1856, which was "a part of the charter, as if copied in it") was bound thereafter to obey the alterations or amendments which that act of 1856 gave the State the right to impose.

After the gas company had once accepted and become bound by its original charter, without requiring any clause against alterations or repeals therein, it was too late for it to claim that it was paying "considerations" when it was afterward obeying the amendments imposed upon it by lawful authority!

In Johnson, etc., v. Crow (87 Pa. State, 184), an act of the Legislature gave to one Kremer the right to maintain a ferry and to receive tolls, for the consideration that he would attend to the ferry and keep the proper boats, etc. A subsequent act of the Legislature gave to Kremer the "*exclusive*" right to maintain a ferry within the limits named in the former act. A third act of the Legislature, afterward, gave to Isaac Crow the right to maintain a ferry, in competition with Kremer, within the same limits.

Kremer attempted to restrain Crow from setting up his new ferry, on the ground that Kremer's exclusive privilege was a contract, and that the subsequent grant to Crow impaired the obligation thereof. The Court held:

"SYLLABUS.—A legislative grant to a private person of a privilege to use a public right for his private gain will not be deemed exclusive, unless the intent of the Legislature is perfectly clear; and nothing less than a plain contract between the State and an individual, for an adequate consideration, can prevent the repeal of such a privilege.

"Where, by an act of the Assembly, certain privileges are conferred upon an individual for a valuable consideration, and, by a subsequent act, said privileges are made *exclusive*, without any new consideration, this second act can not be sustained by reason of the consideration in the original grant, and it may be repealed."

The Court said:

"Conceding, for the occasion merely, that the act of 1866 (the original grant to Kremer), contained a contract for a perpetual privilege, granted to Kremer to keep a ferry over the Susquehanna at Millersburg, it contained no grant of an *exclusive* privilege. The privilege conferred was subject to the undoubted right to grant similar privileges to others. Therefore, when, by the act of 1867, the Legislature made the right to Kremer *exclusive*, it conferred a new right, which it protected by a penalty upon others infringing it; but it required no new duty and no compensation to the State. The mere fact that the title of the act was 'a supplement to an act, etc.,' does not import a consideration. It was not an enlargement of powers under a former act to give further effect, and to be taken as a part of the former grant, but it was an enlargement by way of a new and greater grant. No consideration appearing for the new contract, and the State desiring to protect Kremer merely by a penalty, it would be contrary to the rule of presumptions as to duties and powers of the Legislature, to suppose a binding contract under the act of 1867. The act of 1872, conferring a ferry right on Isaac Crow, was, therefore, no unconstitutional interference with the rights of Kremer."

In Philadelphia Railroad Co.'s appeal (102 Pa. State, 129), there was a grant to one railway company of a right to occupy certain streets, named in its charter, for railway purposes. By an amendment to its charter, it was provided that "said company shall have the exclusive right to occupy the streets named in the act to which this is supplemental."

Afterward, the Legislature granted the right to a new company to run along those same streets with an opposition road. The old company contended that the grant to it of the exclusive privilege was a contract which the new company's charter impaired. The Court decided that the grant to the new company was a valid *pro tanto* repeal of the exclusive privilege given to the old company, and said:

"It was argued that this created a contract with the State which was beyond the interference of the Legislature. There is reason and authority for holding that a supplement to a charter of incorporation which merely confers upon it a new right, or enlarges only an old one, without imposing any new or additional burden upon it, is a mere license or promise by the State, that may be revoked at pleasure. It is without consideration to support it, and can not bind a subsequent Legislature. In the present age of corporate greed, it would be dangerous to hold the contrary doctrine. Were we to do so, corporations, instead of being the creatures of the State, might become its masters."

In Norwich Gas-Light Co. v. City Gas Co. (25 Conn., 36), the grant to the old gas company was originally of a right to lay gas-pipes in the streets. By an amendment of its charter, subsequently passed, it was enacted that the said right to said street should be "exclusive."

Afterward, the Legislature granted the right to a new company to lay pipes in the streets of Norwich. The old company attempted to enjoin the new company, but the Court held that the grant to the new company was a repeal *pro tanto* of the exclusive privilege to the old company, saying:

"Has, then, the amendment to the plaintiff's charter the effect of conferring on them an exclusive property franchise in the streets and public places of the city of Norwich, for the purpose of laying pipes through which to distribute gas? * * As, then, no consideration whatever, either of a public or private character, was reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business like the manufacture of leather or any other ordinary trade, in respect of which the Government has no exclusive prerogative," etc., etc.

The Court there evidently considered that the grant of an exclusive privilege by an amended charter was not supported by the considerations, if any, of the original charter.

In Tucker v. Ferguson (22 Wallace, 574), where the question was raised as to the right of the Legislature to repeal an act by which a railroad was exempted from taxation, this Court said:

"The provision of the thirty-seventh section of the act of 1871, exempting the land specified from local taxation for three years, which period has not lapsed, was not a contract. There was no consideration. The company was required to do nothing, and did nothing, in return. As between individuals, the stipulation would belong to the category of *nude pacts*. It has no higher character, because one of the parties was the State and the other a corporation, and it was put in the form a statute. It was a promise of a gratuity, spontaneously made, which might be kept or recalled at pleasure. The case of Christ's Church v. the County of Philadelphia (24 Howard, 301) is instructive upon this subject."

See, to the same effect, 93 U. S., 505.

In determining whether there was a consideration to support the supposed contract for an exclusive privilege so as to shut off the legislative control, the rule is, as we have seen, that "exclusive rights are not favored," "every presumption is against it," "a doubt is fatal to the claim," and, "it is only when the terms of the concession are too explicit to admit fairly of any other construction, that the proposition can be supported." (101 U. S., 796; 95 U. S., 686.)

We submit that not only is it doubtful whether there was any consideration, but it is clear that there was none.

V.

If the grant of the exclusive privilege to the old company was an irrepealable contract, its monopoly was only of the right of making and selling "coal-gas;" and, properly construed, does not prohibit the new company from making and selling water gas.

The charter of 1867, of the old company, provided, section 20, that it should be the "successor" of the company incorporated in 1838, and should operate the old gas-works. Those old gas-works were and are suitable only for making "*coal*-gas." It was and is only a *coal*-gas works, and a *coal*-gas company.

When the exclusive privilege act was drawn up by the gas company and presented to the Legislature, it was sought to obtain the exclusive privilege of making and selling *any* kind of *gas;* as will be seen from the communication of its president to the city council (record, page 38), where he says the amendment asked would be, "that this company have the exclusive privilege of erecting and establishing gas-works in the city during the charter, and of vending *gas*-lights, etc."

But before the Legislature passed the act, the word "coal" was inserted in front of "gas," and the exclusive grant was limited to the right to sell "*coal* gas lights."

This change evidently meant something, especially when it is recalled that the previous company's charter, of 1838, was not limited to "*coal*"-gas, but said "gas" generally.

The most probable explanation is, that the Legislature knew that a new kind of gas, known as "*water*-gas," was then being introduced, and was coming into vogue; and, knowing that the old company was only capable of making "*coal*-gas," it did not wish to shut off all chance of having the new kind of gas—"water-gas"—in Louisville in the future, if the public interests should require it. It was doubtless deemed enough to give the old company a monopoly in its own line of product, without shutting off from the people all chance of having other kinds of lighting in future. It would have been almost as wanton to shut out future electric lighting, as to shut out water-gas.

When the new company was incorporated in 1872, its charter did not provide for it making or selling coal-gas, but gas generally; which included the right to make and sell *water*-gas.

These two products are entirely different.

In the Encyclopædia Brittanica, Vol. X., page 88, article "Gas,"

"coal-gas" is first treated of as a gas made from a distillation of coal; and then, on pages 100 and 101, under the head of "gas from sources *other* than coal," "water-gas" is treated of, and its manufacture described as "the decomposition of *water* by passing it over a highly-heated surface in presence of glowing charcoal, whereby free *hydrogen*, carbonic oxide, and carbonic acid gases are produced, the carbonic acid being eliminated by a subsequent process of purification," and then, "impregnating it with the vapor of gasoline."

In Nassau Gas-Light Company v. Brooklyn (89 N. Y., 411), the process of making "coal-gas" is described as "a destructive distillation of coal." The two are as distinct as any two other gaseous products.

The fact that numerous letters patent have been issued, in this country and in Europe, for water-gas, long after coal-gas was in common use, shows the marked difference between the two articles.

Under the principle of construing strictly all grants of exclusive privileges, the Courts have said that the grant of a canal privilege does not prevent the subsequent grant of a competing railroad (11 Leigh, 42); nor a wagon line a competing canal line, nor a canal line a competing turnpike line (2 Sanford's Ch., 661); nor a stage-line a competing railroad or canal (*ibid.*); nor a ferry, a competing toll-bridge (2 Porter, Ala., 296); nor a toll-bridge a competing railroad bridge (1 Wallace, 116); nor a wharf, competing pier (4 Wendell, 9); nor does the grant to a competing street railway infringe a previous exclusive privilege to a steam railroad between two neighboring towns (2 Duvall, Ky., 175).

By the principles of construction adopted in those cases, the exclusive privilege to make and sell "coal-gas lights" does not preclude a future grant of the right to make and sell water-gas.

VI.

If the grant of the exclusive privilege to the old company was valid and irrepealable, the monopoly was only as against other "Public" gas-works; and did not affect the new company; which is not a "Public" works.

The monopoly clause, as we have seen, gives to the old company only the exclusive right, to make and sell gas to the city and citizens "by means of a *Public* works."

Construing this monopoly strictly, as must be done, what is meant by a "Public" works?

By looking at the provisions of the charter of the old company, and its answer herein, it will be found that the city of Louisville owned nearly half its stock (record 26 and 28); and the city has the election of four out of the nine directors (charter of 1867, sections 11 and 12) and the city has the right to own it all at the end of the chartered time (charter, sect. 19); and the company is to furnish the "Public lights" (charter, sect. 5); and the city was to have a public inspector of the company (charter, sect. 9); and the books were to be public (sect. 13); and it was to report to the Legislature (sect. 16); and it was exempted from ordinary taxation (sect. 18); and it was given an exclusive privilege.

In its petition for a rehearing in the Court of Appeals (record 75 to 83) the old company reiterates that it is a "Public" institution.

Now the new company is a mere *private* manufacturing corporation. The city owns no stock in it, elects no directors, appoints no inspector, and has no supervision of its books. It furnishes no public lights, has no exemption from taxation, and no exclusive privilege.

The distinction between a public and a private gas-works will be best shown by illustrative authorities.

In Commonwealth v. Lowell Gas Company (12 Allen, 77), there was a gas company incorporated, with no exclusive privileges. It was sought to be taxed, and it claimed exemption under a statute which exempted "*public* corporations" from taxation. It claimed that its works were a *public* works. The Court held that it was not a public corporation, and that its works were not a public works, saying:

"But we fail to see that the defendants can be properly regarded as a corporation of this character. No public duty is imposed upon them; nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use or consumption. It is entirely at their own option, whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on the business is left to their own election. Nor is any power conferred on them to take private property, not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise. The only right or privilege given them is to dig up public streets and ways for the purpose of laying down their mains or pipes. * * The right is only to use land, the whole beneficial use of which has been previously taken from the owner and appropriated to the public use. * * There is, therefore, no ground for the exemption of defendant from ordinary taxation."

In Paterson Gas Company v. Brady (3 Dutcher, New Jersey, 245), it was likewise held that a gas company which has no exclusive privileges, and selling only to those who choose to buy, is not a public works, but is a mere private manufacturing company.

On the other hand—in Shepard v. Milwaukee Gas Company (6 Wisconsin, 545)—the Court held that the Milwaukee Gas Company was a public works, saying:

"It is carried on either by *public* or associated capital;" and, further,

"However, if these reasons are insufficient to distinguish the *character* of this corporation, we proceed to examine another, already in part considered, which, to our mind, is conclusive, viz: The *exclusive privilege* conferred upon the company to manufacture and furnish or sell the gas. * * * * How can it be urged that this is a mere *private* corporation?"

The new company, not being a "public works," the grant of its charter did not, we submit, impair the exclusive right of the old company.

VII.

The new gas company was in condition to bring this suit at the time it was begun.

The old gas company contended, in the Court of Appeals, and may so contend here, that the new company was not in condition to bring this suit at the time it was brought; because it may not have performed all the requirements of its charter, and because the conditions of the grant by the city council of the right to lay pipes in the streets had not been complied with fully, within the time originally named in the ordinance.

To this objection there are several answers.

In the first place, the right of the new company to have the cloud removed from its franchises was precedent to and independent of any consent on the part of the city to the pipes being laid in its streets. The new company had the right to have the cloud removed from its franchises, whether it should afterward lay the pipes or not. The consent of the city could be obtained at a later time; and these very threats and false claims of the old company might, perhaps, obstruct the new company in obtaining the consent from the city. And the old company was denying and threatening the rights of the new company, whether the city gave its consent or not.

In the second place, the new company had obtained fully the consent of the city. The city had passed an ordinance extending the time within which the new company could lay its pipes, for a period of two years longer; and this suit was brought before the expiration of either time. (See record, pages 51 and 52.)

In the third place, the franchises and rights of the new company were valuable, without laying the pipes in the streets; for the business of the new company might have been carried on by laying its pipes over private ground; and, therefore, the consent of the city was not an indispensable prerequisite to its existence, or to enforcing its legal rights.

In the fourth place, all the conditions in the ordinance granting to the new company the right to lay its pipes are conditions subsequent; and the city alone could take advantage of those conditions subsequent, and unless it should have elected to take advantage of them, no one else could make any point with respect to those conditions not being performed. It was a matter entirely between the city and the new gas company; and the city has waived any right to enforce those conditions subsequent, and certainly has never enforced them. The right of the new company to commence laying pipes in the streets took effect immediately upon the passage of the city ordinance, and the forfeiture, if the city chose to enforce it, could only occur by reason of a failure of the new company to afterward perform the conditions subsequent.

In Kenner v. American Contract Company (9 Bush, 202), a right of way through certain lands had been granted to a railroad company, to be void should a certain tax be voted. The tax was voted, and so the condition subsequent was broken. The Court of Appeals of Kentucky said:

> "The more modern authorities on the subject of such forfeitures establish the doctrine that it is with the party in whose favor the condition is, or who becomes entitled to the estate by reason of the forfeiture, to say whether the estate shall be forfeited or not. * * A waiver of a forfeiture may be inferred by reason of the failure of the party entitled to re-enter or assert some claim, within a reasonable time, terminating the estate. * * The court adjudges the waiver of the forfeiture upon the principle, that the happening of the condition does not *ipso facto* determine the estate the same remaining in the grantee, but only subjects it to be defeated at the election of the grantor and his heirs; and for the additional reason that the forfeiture of estates is not favored either in courts of law or equity."

In the fourth place, it is expressly provided by section six of the charter of the new company (record, page 15):

"But the neglect or other failure of the company to so elect, or to do *any other act* required to be done by this company, its stockholders, or directors, shall not work a forfeiture of this charter, or of the privileges and advantages under the same."

And, in the fifth place, this Court will not, upon this writ of error to the Appellate State Court, consider this question; as it is not a Federal question.

It would certainly be singular if the old gas company could secure impunity for its wrongful acts, by referring to conditions subsequent of the new company which have never been violated, and which, if violated, have never been enforced, but have been waived, by the only party authorized to enforce them—the city of Louisville or the State of Kentucky. We submit, therefore, that the new company was in condition to sue for its rights at the time this suit was filed. (See the Court of Appeal's opinion on this point, record, page 59.)

VIII.

The equitable remedy of Injunction was a proper remedy for the new company to pursue, to protect its statutory rights and franchises, and to prevent the old company from carrying out its threatened interferences with, and injuries to, the new company, and its rights and business:

On this preliminary question, the Court of Appeals of Kentucky said, in this case:

"The first point made by the appellee (the old company) is that this suit in *equity* for an *injunction* is not the proper remedy by which to determine whether the appellee has the exclusive right to the manufacture and supplying of gas to and in the city.

"If the exclusive right, insisted upon by the appellee (the old company), is without warrant of law, or unconstitutional and void, and the assertion of that right prevents the appellant (the new company) from selling its stock and raising the large amount of money necessary to enter upon the enjoyment of its franchise, the whole of the charter rights of appellant (the new company) are destroyed by the assertion of an unfounded claim on the part of appellee. In such a case, the remedy adopted (*injunction*) is peculiarly appropriate; as has been expressly adjudged in the similar case of Crescent City Gas-Light Co. v. the New Orleans Gas-Light Co. (27 Louisiana Annual, 142). As to whether such claim of exclusive privilege is unfounded, because unconstitutional, we will inquire into hereafter. It is enough for the jurisdiction, that the claim is so alleged."

(See Court of Appeals opinion herein, record, page 58, and 81 Kentucky Reports, 266.)

The new company had a *statutory* grant of the right to erect and maintain gas-works, and to make and sell gas in the city of Louisville. It had also the easement, or franchise, by legislative grant, upon the consent of the city of Louisville being obtained, to open the streets of the city of Louisville and to lay its pipes therein. It had also the franchise, by legislative grant, to sell its stock, to the amount of $750,000, for the purpose of raising the means with which to inaugurate and carry on its business.

These grants were valuable, and the franchises secured by them were property rights. The only obstacle in the way of the exercise of these legislative grants and franchises of the new company, and in the way of the new company availing itself of these valuable property rights, was the claim of the *old* company to the *exclusive* right to make and sell gas and use the streets for that purpose: and the claim of the old company that these grants and franchises of the new company were null and void; and the threat of the old company (which its answer herein shows it intended to carry out, if it can) to prevent the new company from opening any streets, or laying any pipes, or building any works, or making or selling any gas, in the city of Louisville. These claims and threats of the old company (which it is now vigorously endeavoring to substantiate in this case) stood, at the beginning of this suit, not only as a deadly menace, but as an actual and practical obstruction across the path of the new company, in the use of its property rights and franchises. They rendered the legislative grants and franchises of the new company wholly valueless, and as ineffectual as if they were not in existence.

The new company, having its statutory grants and franchises to sell stock, and to make and sell gas and lay pipes in the streets of Louisville, and being obstructed in the exercise of its rights and franchises by the old company's claim of exclusive right, and by the old company's public assertions of the invalidity of the rights of the new company, and by the threats of the old company; the new company would simply have fallen still-born, unless the Courts of Equity would hear and determine the conflicting rights, and grant it the relief that was indispensable to its commencing its business existence.

It is no answer to this for the old company to say that the new company had not sold its stock nor raised the money necessary to build and carry on its works or lay its pipes. One of the very things which the

new company complained of was that the old company had, by its wrongful conduct and threats, prevented the new company from selling its stock; and the old company can not thus take advantage of its own wrong, by alleging the condition of things produced by its own unlawful conduct as a reason why the new company should have no relief from a continuance of that unlawful conduct. The practical test has been, that as soon as the injunction was issued, the new company was able to sell its stock, and build its works, and lay its pipes, and conduct its business; which it could not do before.

In High, on Injunctions, section 372, it is said:

"The prevention of a cloud upon the title is a salutary branch of the jurisdiction of equity recognized by all of the authorities, and founded upon the clearest principles of right and justice. The jurisdiction by injunction to prevent a cloud upon the title is closely analagous to the well-settled jurisdiction of Courts of Equity for removing clouds upon title; and the reason which supports the jurisdiction in the latter case would seem to apply with equal, if not greater, force to the former. It seems, therefore, to follow, as a necessary consequence, that if the aid of equity may be invoked to remove a cloud upon title to realty, it may, with equal propriety, be exerted to enjoin such illegal acts as will necessarily result in a clouded title."

The same author, section 898, says:

"The former tendency of the English Court of Equity seems to have been to require the plaintiff first to establish his right at law, before relief by injunction would be granted for the protection of his franchise. But, in this country, the doctrine may now be regarded as well established, that to warrant the interposition of equity for the protection of *franchises* it is not necessary that the owner of the franchises should first have established his right by action at law. The legislative power of the State having authority to grant the exclusive right which is sought to be protected, the grant of such a right is regarded as equivalent to having established it at law."

The same author, section 912, says:

"And although such injuries to a franchise as call for the interposition of equity and the grant of an injunction are generally in the nature of nuisances, and although the jurisdiction of equity over such cases partakes largely of the nature of the jurisdiction in restraint of nuisances, yet, relief may be granted where the injury to the franchise is purely a trespass, if the remedy at law is inadequate."

The same author says, section 897:

"The violation of franchises or special privileges, conferred by legislative

authority either upon individuals or corporations, affords frequent occasion for invoking the extraordinary aid of equity, by way of injunction, to remedy evils which the usual modes of redress in Courts of law are powerless to mitigate or to prevent. The value of a franchise being generally dependent upon its exclusive use and possession, it may be protected upon the ground of the inadequacy of the legal remedy, and the probability of thus avoiding a multiplicity of suits."

In Boston & Lowell Railroad Company v. The Salem Railroad Company (2 Gray, 27), the Court, speaking through Chief-Justice Shaw on the subject of protecting statutory grants of franchises by injunction, said:

"The first question usually considered in cases of equity is, whether the Court has jurisdiction; and it has not been omitted in the present case. The subject of controversy is a mere naked and incorporeal right claimed by the plaintiff to have and enjoy a right to maintain a railroad, and to take tolls and profits thereof; a right created and granted to them by the Government of the State; and they allege, whether correctly or not is hereafter to be considered, that the defendants have disturbed them in the enjoyment of the incorporeal right. It is a right or title which, if it exist at all, is purely a statutory right. It is created by law, it exists only in contemplation of law, it is invisible, and depends upon the law for its protection. It involves no complicated inquiry into facts, it depends mainly upon the enactment, the validity, and legal construction, of legislative acts. If the right exists and has been invaded, the appropriate and specific remedy that should prevent the continued invasion is by injunction; and this can be afforded only in equity. On these grounds, we are of opinion that such a case is within the ordinary scope of equity jurisprudence; and that the jurisdiction is peculiarly appropriate to such a case. An injunction will generally be granted to secure the enjoyment of a statute privilege of which the party is in actual possession, unless the right is doubtful."

As the Court of Appeals of Kentucky said in its opinion in this very case, the precise question of the jurisdiction of equity has been decided in the very similar case of the Crescent City Gas-Light Company v. the New Orleans Gas-Light Company (27 Louisiana Annual, 138). The controversy there, as here, was between an old and a new gas company. The old company was chartered in 1835, with the exclusive privilege of making and vending gas in New Orleans, and, under its charter and amendments to it, its corporate existence was to end on April 1, 1875. By a legislative act of 1860, it was provided that the charter of said old company, as then established, should remain in full force until April 1, 1895, an extension of twenty years, just as in this case. The *new* company in that case (the "Crescent City Gas-Light Company") was incorporated in 1870, with the right

and privilege of making and selling gas in the city of New Orleans for fifty years from April 1, 1875. The new company there sued for an injunction against the old company, making substantially the same allegations, and praying substantially for the same relief that we make and pray for in behalf of the new company in this case. There, as here, it was alleged that the new company would have to sell its stock in order to raise the money to build its works and lay its pipes; there, as here, it was alleged that the assertions and claims of the defendant, the old company, of its pretended exclusive privileges, threw a cloud upon the plaintiff's charter rights, privileges, and franchises, and were calculated to, and did, impair the value of plaintiff's said rights, and its credit, and prevented the stock of the new company from being subscribed for, and prevented the plaintiff from being able to raise money, or to build its works, or lay its pipes in the streets. The prayer was for an injunction, as in our case.

The Supreme Court of Louisiana sustained the jurisdiction and granted the injunction, saying:

"The franchise of the plaintiff is property; and it has been invaded in the enjoyment thereof by the claims and pretensions of the defendant, founded upon a statute alleged to be unconstitutional and void. It is true that the right of the plaintiff to make and vend gas will begin on April 1, 1875 (several years after the opinion was rendered); but the right to sell shares of its capital stock to the amount of $3,000,000, and the duty to erect works, buildings, machines, lay gas pipes, and prepare everything to begin the enterprise or business, vested the moment the corporation began. Indeed, all of plaintiff's franchise vested from the moment the grant was made by the State; the exercise of the right, however, to make and vend gas being postponed until April 1, 1875.

"If the claims and pretensions of defendant, founded upon a void statute, destroy the credit of the plaintiff, so that its shares of capital stock can not be sold or funds raised in order to construct the necessary works to begin the business of making gas by the time stipulated in the charter, are not the rights of the plaintiff to that extent invaded? If these unfounded claims and pretensions hinder or prevent the plaintiff from getting ready to begin business on April 1, 1875, is not an injury sustained on account thereof?

"Not only plaintiff's right to sell shares of its capital stock is invaded, but practically all the privileges conferred by the charter are defeated, because plaintiff is stripped of the means necessary to begin the business contemplated by the grant. The plaintiff has as much right to use the means authorized by the charter to make its *preparations*, as it will have to pursue the business when the preparations are made; and an invasion of the one ought to be redressed as much as the invasion of the other. A void title, set up to defeat plaintiff's right to prepare for the business, invades the charter as effectually as if set up to obstruct the business after it has begun." (27 La. Ann., 138.)

In the case at bar, it will be borne in mind that the plaintiff's right to lay pipes was dependent upon its obtaining the consent of the city of Louisville. The city of Louisville granted that consent in an ordinance which fixed a limited period of time within which the work must be done.

Unless, therefore, the rapid and effectual remedy of an injunction could be obtained by the new company, it would be impossible for it to do the work within the time which the city required. No legal remedy would be adequate, or of any value whatever in such a case. Equity alone could grant relief. And it was not necessary that the new company should wait, in the face of the obstructions and threats of the old company, until it was too late for the new company to do anything, and until the raising of funds would be of no value.

In Osborne v. Bank of U. S. (9 Wheaton, 738), it was held. (syllabus):

"A Court of equity may restrain, by injunction, a public officer of a State from acting under a void law of a State to destroy franchises.

This Court there said, page 841:

"The interference of the Court in this class of cases has most frequently been to restrain a person from violating an exclusive privilege by participating in it. But if, instead of a continued participation in the privilege, the attempt be to *disable* the *plaintiff* from *using* it, is not the reason for the interference of the Court rather strengthened than weakened?"

In Jersey City Gas Company v. Dwight (29 New Jersey Equity Reports, 249), the plaintiff was granted the right of laying its gas-pipes through the streets of Jersey City. The defendants threatened to interfere with this right so as to disturb the plaintiffs in exercising the right. An injunction was issued, the Court saying:

"In this condition of affairs I do not think there can be the slightest doubt as to the duty of the Court. The right of a corporation to seek protection of a Court of equity against an infringement or usurpation of its franchises is a familiar rule of equity jurisdiction; and it is equally well established that a franchise is property, which, like every other thing susceptible of ownership, is under the protection of the law."

In Croton Turnpike Company v. Rider (1 Johnson's Chancery, 615), a franchise was given to a turnpike company to erect toll-gates and take tolls on a certain road. The defendants undertook to render

nugatory this franchise by building a dirt-road around the toll-gate. The Court issued an injunction, saying:

"It is then a plain case of a material and mischievous disturbance of the plaintiffs in the enjoyment of the *statute privilege*, which was granted to them by the Legislature for public purposes and founded on a valuable consideration. * * * * It is settled that an injunction is the proper remedy to secure to a party the enjoyment of a statute privilege of which he is in actual possession, and when his legal title is not put in doubt. The English books are full of cases arising under this head of equity jurisdiction. * * * * And equity jurisdiction in such a case is extremely benign and salutary; without it the party would be exposed to constant and ruinous litigation, as well as to have his rights successively impaired by frauds and evasion." See, likewise, Newburg Turnpike Company v. Miller, 5 Johnson's Chancery, 111.

This doctrine has been long recognized in Kentucky.

Thus, in Newport v. Taylor (16 Ben Monroe, 779), there was a legislative grant of the franchise of operating a ferry. The defendants attempted to interfere with this franchise, and an injunction was granted to protect the franchise. The syllabus reads:

"The right of holding a ferry and its privilege of conveying passengers for tolls is a franchise, in which the Chancellor may protect the person in possession; not only affording redress for the past, but to restrain its repeated disturbance; especially if the right has been judicially established."

In short, the new gas company was simply stifled, by the false claims of the old company and by its threats. It could neither sell stock, borrow money, build gas-works, lay pipes in the streets, nor sell nor deliver gas. A cloud was thrown over its right and title to do any of these things, and threats were made that it should never be permitted to exercise any such rights. An injunction alone could afford its relief, and enable it to exist. That remedy has been afforded in this case; and its necessity, as well as its efficacy, are fully illustrated herein. When the appeal was made to the Chancellor for an injunction, the new company had been kept and rendered hopeless, and almost lifeless, by the false clamor and threats of the old company. When these threats were stopped, and those clouds removed by the injunction, the new company could at once sell its stock, raise means, build works, lay pipes, and furnish "water-gas" to the citizens of Louisville in healthy competition with the "coal-gas" of the old company.

We submit, therefore, that equity had jurisdiction, and that an in-

junction was the proper remedy. And, we further submit, that this not being a Federal question, this Court will not overturn the ruling of the State Court thereon.

The property interests involved in this case are very large, but the principles of law involved are far greater. To reverse this case, and fasten a monopoly upon one of the important cities of the country, would be a public misfortune; and it would, we submit, establish an unhappy precedent, and involve a retraction by this Court of many of its most valued utterances.

We respectfully ask an affirmance.

JOHN MASON BROWN,
GEORGE M. DAVIE,
For Defendant in Error.

WM. LINDSAY,
Of Counsel.

The old company may contend that the provision of the Kentucky constitution, Art. XIII, Sec. 1, authorizes an *irrepealable* monopoly; in providing that "all freemen, when they form social compact, are equal, and that no man or set of men is entitled to exclusive separate public emoluments or privileges, from the community, but in consideration of public services." They may contend that, by *prohibiting* the granting of exclusive privileges, *except* in consideration of public services, it *impliedly* gives by *inference* the right to grant exclusive privileges, where there are public services; and that the gas company performs public services in the meaning of the provision. And they may contend that it can be *impliedly inferred*, from that provision, that the exclusive privilege which may be granted for public services, is to be *irrepealable*, and beyond future legislative control. To this there are several answers.

In the first place, the old company was not performing "public services," in the meaning of the constitutional provision. (See 12 Bush Ky., 110; 80 Ky., 269.)

In the second place, that provision was not intended to *enlarge* exclusive privileges, or to authorize them; but to *restrict* and *prohibit* them. It is a *restrictive* clause, and not an enlargement of the power to grant monopolies; and certainly it should not be enlarged by "inference," or "implication," in favor of monopolies.

In the third place, that provision does not say that an exclusive privilege, granted in consideration of public services, shall be *irrepealable*, or that the Legislature shall lose all control over it; and, as we have seen, legislative control over exclusive privileges will not be considered as taken away by implication, nor except by the *clearest* and most "unequivocal" language. In the Constitution of Louisiana, there was a provision that an exclusive privilege or monopoly should not be granted for a longer period than twenty years; from which it might equally well have been contended that, by *implication*, an *irrepealable* mononoly could be granted for twenty years. But this Court,

in the Slaughter-house cases (111 U. S., 746), held that, although the Louisiana Legislature had the power to grant an exclusive privilege, yet, there was no constitutional implication that, when granted, it should be *irrepealable*, or that it should not be subject to subsequent legislative control.

This matter is answered in the opinion of the Court of Appeals herein (Record, page 62).

The utmost that can be *inferred* from that provision of the Kentucky Constitution is, that it gives authority to the Legislature (which it was doubtful whether it otherwise had, and which, in 1850, when the Constitution was passed, it was doubted whether the Legislature did have) to grant exclusive privileges where public services were performed. The provision does not, in any manner, say that the grant of exclusive privileges where there were public services should be *irrepealable*, and beyond legislative control for the next twenty, or fifty, or a thousand years! The question of the *irrepealability* and subsequent legislative control over the exclusive privilege is not alluded to in any mode in the Kentucky Constitution; but is left, as in the Louisiana Constitution, to be governed by general principles of constitutional law.

Supreme Court U. S.
FILED
NOV 2 1885
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES

THE LOUISVILLE GAS COMPANY, PLAINTIFF IN ERROR,

VERSUS

THE CITIZENS' GAS-LIGHT COMPANY, DEFENDANT IN ERROR.

IN ERROR TO KENTUCKY COURT OF APPEALS.

ARGUMENT FOR DEFENDANT IN ERROR.

WM. LINDSAY,
For Defendant in Error.

BROWN & DAVIE,
Of Counsel.

YEOMAN PRINT, FRANKFORT, KY.

SUPREME COURT OF THE UNITED STATES.

THE LOUISVILLE GAS COMPANY, PLAINTIFF IN ERROR,
vs.
THE CITIZENS' GAS-LIGHT COMPANY, DEFENDANT IN ERROR.

Argument for Defendant in Error.

IN ERROR TO KENTUCKY COURT OF APPEALS.

STATEMENT.

The plaintiff in error, the Louisville Gas Company, is the successor to a corporation originally styled "The Louisville Gas and Water Company," incorporated by an act of the General Assembly of the Commonwealth of Kentucky, approved January 15th, 1838.

The style of that corporation was changed by an act approved January 31, 1842, to that of "The Louisville Gas Company." Section 10 of the act of 1838 provided that the Company should have the exclusive privilege of erecting, establishing, and constructing gas-works in the city of Louisville, and of vending gas-lights therein to the city and its citizens during the continuance of the charter, which was to expire on the 1st day of January, 1869.

By an act approved January 30, 1867, entitled "An act to extend the charter of the Louisville Gas Company" (Session Acts 1867, v. 1, p. 188), it was provided, in a certain contingency, that a new Company should be incorporated, by the name and style of "The Louisville Gas Company," to continue in existence for twenty years from the first of January, 1869. The stock of this new Company was to consist of the stock of the then existing Gas Company, of the contingent fund and undivided profits of that Company, and such stock as the new Company might issue and sell within the maximum limit of $1,500,000. The provision

relating to the exclusive privilege of erecting and maintaining gas-works, and of vending gas to the city of Louisville and its inhabitants, was omitted from this charter.

The new Company commenced business under the charter of 1867 on the 1st of January, 1869. Its organization under this new charter constituted it a new corporation. (*Cain vs. Commonwealth*, 14 *Bush*, 535; *Railroad vs. Maine*, 96 *U. S.*, 499.)

On the 22d day of January, 1869, the General Assembly amended the act of 1867. (Sess. Acts, 1869, vol. 1, p. 166.)

The preamble to this amendment is as follows:

"WHEREAS, The city of Louisville and stockholders of the old Louisville Gas Company have accepted the said extended charter, and have agreed to certain amendments thereof, and desire that they may become a part of said extended charter."

The 5th and 6th sections of this act provide as follows:

"5th. That said Gas Company shall have the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuation of this charter, and of vending coal gas-lights, and supplying the city and citizens with gas by means of public works: *Provided, however*, This shall not interfere with the right of any one to erect, or cause to be erected, gas-works on their own premises for supplying themselves with light.

"6th. That no alteration or amendment to the charter of the Gas Company shall be made without the concurrence of the City Council and the directors of the Gas Company."

In 1872 the General Assembly incorporated the defendant in error, "The Citizens' Gas-Light Company," by an act approved March 21, 1872. (Acts of 1871–2, vol. 2, page —.)

Said defendant was empowered to make, sell, and distribute gas for the purpose of lighting the buildings, public and private, in the city of Louisville, and its adjoining territories, with the streets, highways, lanes, alleys, parks, and other public places therein; and, with the consent of the General Council, to open the ground in any street, lane,

public place, &c., within the aforesaid limits, to lay down and upon it pipes, mains, &c.

In 1877 the General Council of the city of Louisville consented, by ordinance, that defendant might establish gas-works, and put down its mains and pipes in and along the streets, alleys, public ways, and public grounds of the city.

It thereupon opened its books and undertook to sell its stock, in order to enable itself to carry out the purposes of its creation. It was at once met with the claim on the part of the Louisville Gas Company, its directors, officers, and stockholders, that that Company had the exclusive right to manufacture and sell gas within the corporate limits of the city of Louisville, and that the grant to the defendant was null and void, because forbidden by the 6th section of its amended charter of January 22, 1869, which charter they insisted was in the nature of a contract between the plaintiff in error and the State of Kentucky, and within the protection of the Constitution of the United States. The consequence of this claim, which was openly and persistently asserted, was to defeat the attempts of defendant to sell its stock, and to disable it from establishing or constructing gas-works. For relief against this wrong, the Citizens' Gas-light Company filed its petition in the Louisville Chancery Court against the plaintiff in error and its officers, and prayed that Court to adjudge that its charter was valid, that it had the right to establish and operate gas-works, and to lay down its mains and pipes in the streets and public ways and grounds of the city of Louisville, and to make, sell, and supply gas within the territory named in its charter; and also to adjudge that the defendants to its petition, and especially the Louisville Gas Company, have not an exclusive right to establish and operate gas-works, or to lay down pipes, or to make or sell gas in said localities, and that they be perpetually enjoined and restrained from setting up claim to said pretended exclusive right or privilege,

and from in any manner impeding or preventing the petitioner from the full enjoyment of all its chartered rights.

After full preparation the cause was heard, and the petition of defendant dismissed by the Chancery Court. Thereupon an appeal was prosecuted to the Court of Appeals by the Citizens' Gas-light Company. Upon the hearing of that appeal the Appellate Court reversed the judgment of the Chancery Court, and remanded the cause,

"With direction to issue a perpetual injunction restrain-
"ing appellee from claiming and exercising the exclusive
"right to manufacture and supply gas to the city and citi-
"zens of Louisville."

To reverse that judgment the Louisville Gas Company prosecutes this writ of error.

ERRORS ASSIGNED.

The three errors assigned by the plaintiff in error resolve themselves into the single proposition that its charter, as amended, constitutes a contract between the State of Kentucky and the Gas Company and the city of Louisville, securing to it the exclusive right to have and maintain gas-works, and to manufacture and vend gas-lights within the territorial limits of the city of Louisville, until the first day of January, 1889; and that the grant to the defendant in error is in violation of the obligations of that contract, and void because repugnant to the 10th section of the Constitution of the United States.

DECISION OF COURT OF APPEALS.

An examination of the several opinions filed by the Judges of the Kentucky Court of Appeals, will show that its judgment of reversal, as concurred in by all four of the Judges, was rested upon the provisions of the act of February 14, 1856 (*Stanton's Revised Statutes, vol. 2, page* 121), which was re-enacted and carried into the General Statutes. (Sec. 8, chap. 68, Gen. Stat.)

That act provides:

"That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The grant of rights and privileges to the Citizens' Gas-light Company, inconsistent with those previously granted to the plaintiff in error, operated as a repeal or modification of the latter's charter, to the extent of such conflict or inconsistency.

This was the interpretation put upon these Kentucky statutes by the Kentucky Court of last resort. This Court will accept it as the true interpretation, and confine its inquiries to the question, whether the charter granted the defendant in error, as construed by the Kentucky court, operates to impair the obligations of a subsisting and irrepealable contract between the Gas Company and the State. If the charter of the Gas Company, as amended by the act of 1869, read in the light of the act of 1856, was intended to confer upon that Company the exclusive and irrepealable privilege it claims, for the term of twenty years from the 1st day of January, 1869, to manufacture and sell gas-lights to the city and citizens of Louisville, and it was within the constitutional power of the Legislature to bind the State by such a grant, and the same rests upon a sufficient consideration, then we have a case in which the Federal judiciary may properly interfere.

But if the Kentucky Court decided correctly, that the amended charter of the Gas Company did not plainly express an intention contrary to the power reserved by the act of 1856, to amend or repeal all charters and grants of or to corporations, "or amendments thereof," then the judgment complained of should be affirmed by this Court.

The Kentucky Court did not decide that the Legislature had the power to abridge or modify the privileges or franchises of a corporation, the charter of which plainly expressed, or expressed at all, an intent contrary to the exercise of such power. But it looked into the provisions of the charter of the Gas Company, and compared them with the act of 1856, and then decided that the grant to the defendant in error could be constitutionally made.

In the opinion delivered by Judge Hines, in which the then Chief Justice Hargis concurred in every particular, this point was discussed, and disposed of thus:

"The amendment of 1869 appears to have been passed "for no other purpose than that of giving to appellee the "exclusive right claimed, since it imposed no new duties "sufficient as a consideration to support the grant. The "only difference between the acts of 1867 and 1869 is, "that under the act of 1867 the Company was bound to "extend its main pipes when the public and private lights "would pay eight per centum profit, while the act of 1869 "required only a profit of seven per centum; and while in "the act of 1867 the Company is required to supply lights "on the streets at actual cost of manufacture, the act of "1869, in addition, provides that each of such lights shall "not exceed the price of thirty-five dollars. As already "stated, the act of 1867 had been accepted, and was being "acted under at the time of the amendment of 1869, so "that there appears to be nothing to prevent the exercise "of the right of repeal reserved to the Legislature by the "act of 1856, unless it is the last section of the act of 1869, "which provides 'that no alteration or amendment to the "charter of the Gas Company shall be made without the "concurrence of the City Council and the directors of the "Gas Company.' There is nothing else in the act of 1867, "or of 1869, 'plainly expressing,' or even expressing by "implication, the intention to make the franchise irrevoca-"ble within the limitations of the act of 1856. This section "was clearly not intended to be a limitation upon the power "of legislative repeal, but was intended to regulate the "respective rights of the city and the Gas Company, so that "neither, without the consent of the other, could call upon "the Legislature to exercise its right of alteration or repeal. "The grant of the 'exclusive' privilege for twenty years to "manufacture and supply gas does not express or imply a

"restraint upon the legislative power of repeal or alteration "any more than the terms of the charter of 1867, which "limits the life of the Company to twenty years. The in- "violability of charters rests upon the ground of executed "contracts, supported by a valuable consideration. Here "there was no consideration, for the Louisville Gas Com- "pany had already accepted the charter binding it to the "performance of the duties imposed by the amendment of "1869. The act of 1872, incorporating appellant, being in "conflict with the grant of an exclusive privilege to appel- "lee, necessarily repeals that portion of appellee's charter, "but in no way interferes with its rights in other respects." (Printed record, page 65.)

In these rulings Judges Pryor and Lewis concurred, and upon these grounds the judgment of the Chancellor was reversed.

To a petition for a rehearing Judge Pryor responded for a unanimous Court. (Page 99, printed record.)

Commenting upon the power of negation conferred upon the city of Louisville and the Gas Company by the 6th section of the act of 1869, he said:

"It was not intended that the action of the two corpora- "tions should constitute the legislative will; and if the act "of 1856 was to be ignored, it would have been an easy "task for the Legislature to have said that the act of 1856 "should not apply to the new charter. This Court is asked "to say that the 6th section of the new charter repeals by "implication the act of 1856, when it is evident, we think, "that such a construction never entered the legislative mind. "The power of the Legislature over the charter was never "surrendered; and the only purpose of the sixth section "was to prevent legislation in behalf of one corporation "without the knowledge of the other.

"If the Company, by its charter, sought to accomplish "such a purpose, it should not have left any room for con- "struction in a matter affecting such vital interests. We "are asked to surrender all legislative control over the sub- "ject upon a doubtful construction of the statute. This "ought not to be done."

Whether this Court is bound by the construction put upon the charter of the Gas Company and the act of 1856 by the Kentucky Court of Appeals, I shall not stop to dis-

gas-works in the city of Louisville, and of vending and supplying coal gas-lights to the city and its citizens, do not militate against the conclusion that the Legislature had power, under the act of 1856, to incorporate the defendant in error, and to confer upon it the rights, privileges, and franchises enumerated by its charter.

No matter how sweeping and unconditional the grant of privileges to a corporation may be, it will not be deemed inconsistent with the exercise of the powers reserved to the Legislature by the general laws. This is the doctrine of the principal opinion in the Sinking Fund Cases (99 U. S., 700). It is also the doctrine of the dissenting opinions, in one of which it was said, that such a reservation is

"To be interpreted as placing the State Legislature back "on the same platform of power over the charter containing "it as it would have occupied had the constitutional restric- "tion about contracts never existed." (*Justice Bradley in Sinking Fund Cases*, 95 *U. S.*, 748.)

That there should be no mistake as to when this reserved power should be regarded as surrendered in Kentucky, the act of 1856 declares that it shall always exist, unless "a contrary intent be therein *plainly* expressed." The Courts are not to resort to implication or construction, or to take hold of expressions indicating a probable purpose to free the corporation from legislative control. The intention so to free it must be "*plainly expressed.*" The language relied upon must be clear and unequivocal. The conclusion must be fairly unmistakable. (*See C. & O. R. Co. vs. Barren County Court*, 10 *Bush*, 609.)

The grant of an exclusive privilege does not imply, much less plainly express, an intention by the State to abdicate its power to control the exercise thereof, or to revoke it in part or, in whole in the public interest. Special grants of privileges which cannot be enjoyed independent of legislative sanction, are necessarily exclusive so long as they may be enjoyed by a single grantee. But such exclusive rights

are operative only for the time being. (*Butchers' Union Case*, 111 *U. S.*, 750)

In the case at bar the exclusive rights were taken subject to the reserved right of the Legislature to amend or repeal the charter under which they are claimed.

The declaration of the 6th section of the act of 1869, that no alteration or amendment shall be made to the charter of the Gas Company without the consent of the City Council of Louisville and the directors of that Company, does not present a question of construction substantially different from the proposition just considered.

An examination of the several provisions of the acts of 1867 and 1869 will show that the Legislature not only created the new corporation, but formulated the terms of a contract between the Gas Company on the one side and the City of Louisville, in its municipal character, on the other, and also declared authoritatively the relative rights of the two classes of stockholders—the one composed of private individuals, and the other of the city of Louisville. Section 7 of the act of 1867 regulated the rights and fixed the responsibilities of the Gas Company in regard to the opening of the streets and sidewalks, made necessary by the extension and preservation of its pipes and mains.

Section 8 prescribed the duties of the Company in regard to putting up and maintaining street lamps, and furnishing gas-lights for the same, and fixed the prices the city should pay therefor.

Section 11 provided that the individual holders of stock should elect five directors, and the General Council of Louisville four other directors, and then prescribed the duties and powers of the board so constituted, and provided further, that no person or corporation, other than the city of Louisville, should hold more than two thousand shares of the capital stock of the Company.

Section 19 gave the city the right to purchase the gas-works at the expiration of the charter at a valuation therein provided for.

Before the act of 1867 had been accepted by the stockholders of the old Gas Company, and preliminary to an organization of the new corporation, negotiations were opened between the officers of the old Company and the General Council of the city of Louisville looking to an application to the Legislature for amendments to the act of 1867. Of these negotiations and their result, the facts are thus set forth by the plaintiff in error in its answer. (See printed record, pages 24 and 25):

"Defendants further state that, by a resolution of the General Council of the city of Louisville, approved by the mayor December, 1868, said city declined the option allowed to it by the 18th section of the act of February 15, 1838, to purchase said gas-works. * * * * *

"At that time the city of Louisville was very largely interested in the stock of said Louisville Gas Company, owning 4,985 shares thereof, and all of its streets, which were lighted at all, were lighted by said Company, and the gas sold to its citizens was supplied entirely by said Company. As the charter of 1838 was about to expire, said city, both on its own part, as well as in the interest and for the protection of its citizens, considered it not only its right, but its duty, to inquire into, and, if possible, agree upon the terms of any acts to go into effect on the expiration of said act of 1838.

"Thereupon a conference was invited and granted, and duly took place between the board of directors of said Gas Company and the General Council of said city, through a committee duly appointed by each of its boards. After full consideration of the whole matter, it was mutually agreed between said Company, through its board of directors on the one part, and said committee upon the other part, that said city and said company should jointly apply to the Legislature of the State of Kentucky to amend said act of January 30th, 1867, in the particulars hereinafter set forth. Thereupon said committee reported its action to said boards, with a draft of such amendatory act, and the action of said committee was ratified, and said proposed amendatory act was thereupon approved by resolution of both of said boards, which was approved by the mayor of said city

in December, 1868. Defendants file herewith, as part hereof, a certified copy of said proceedings of said General Council, of the report of said committee, and the resolution so adopted.

"Thereupon, at the joint request of said Company and said city of Louisville, the Legislature of the State of Kentucky passed the act referred to in the petition herein, which was approved January 22d, 1869, and is the same so agreed upon as aforesaid." (For exhibit referred to, see page 32, printed record.)

From all this, it is plain the Legislature intended by the act of January 22, 1869, to ratify, approve, and validate the agreement theretofore entered into between the old Gas Company, representing one class of the stockholders in the new Company, and the city of Louisville, the owner of all the remaining stock in such new Company at the time of its organization.

The preamble to the act of 1869 shows that the General Assembly was acting at and upon the request of the two sets of stockholders, and for no other purpose than that of ratifying and legalizing their antecedent agreement.

The contract these two sets of stockholders had attempted to make was *ultra vires* of the act of 1867. It was one, however, to which the State had no grounds of objection, and which the Legislature was willing to validate, as consistent with the wishes of the stockholders of a corporation already organized, and engaged in the active discharge of all the duties it had assumed towards the public, when it accepted by its organization the charter of 1867.

The act validating the agreement in question changed the provisions of the charter of 1867 in these respects:

The 4th section of that act deprived the city of Louisville of the power to sell or otherwise dispose of its stock or other interests it had or might have in the new Company or its property.

The 2d and 3d sections modified the duties of the new company as to the extension of its pipes, and relieved it of the limitation upon its charges to private consumers of gas

to the average charges for similar services in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, and gave it the right to so grade its charges as that its profits might equal twelve per centum per annum on the par value of all its capital stock, and this, notwithstanding the fact that the charges against the city might not pay the actual cost of the gas furnished.

As we have seen, these alterations were made at the instance of the city and the Gas Company. The charter, as amended, embodied the contract or agreement between these two contracting parties, and for the purpose of protecting each against the other in the future, they procured the Legislature to declare that no further alteration or amendment to the charter should be made without the joint consent of the two contracting parties. This is the natural, logical, and common sense interpretation of the act of 1869, and the history of the enactment, as it appears from the answer and exhibits of the plaintiff in error, affords convincing evidence of the correctness of this interpretation.

If, however, it be a question of doubt whether the Legislature intended to bind the two contracting parties, or to bind itself by the 6th section of the act of 1869, the doubt will be resolved in favor of the State and against the corporation. This Court thus stated the rule in *Ruggles vs. Illinois* (108 *U. S.*, 531):

"Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established, the Legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require."

And thus in the *Charles River Bridge Case* (11 *Peters*, 420):

"It can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created. This is an elementary principle."

In this case the plaintiff in error claims that the Legislature intended, by the act of 1869, to contract, on behalf of

the State, with the Gas Company, that it should have and enjoy the exclusive privilege under consideration for the term of twenty years. Here, as in *Tucker vs. Ferguson* (22 *Wallace*, 575):

"The contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it There must have been a deliberate intention clearly manifested on the part of the State to grant what is claimed. Such a purpose cannot be inferred from equivocal language." (*See also Newton vs. Commissioners*, 100 *U. S.*, 561)

"The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court." (*Fertilizing Co. vs. Hyde Park*, 97 *U. S.*, 659)

The general intention of the Legislature of Kentucky to retain control over corporate franchises and privileges is unmistakably manifested by the act of 1856. There can be no presumption the plaintiff in error was intended to be granted immunity from that control. The presumptions are all the other way; and when it is remembered that the occasion for the legislation of 1869 was the agreement between the city of Louisville and the other stockholders of the new Gas Company to certain amendments to the charter of 1867, and their desire that such amendments should be made part of the new charter, the presumption is well nigh conclusive that the Legislature had no thought of binding the State by a new contract, involving the surrender of the general powers reserved by the act of 1856.

The provision the Gas Company relies upon to overcome the logical presumption, and to show that the Legislature "*plainly expressed*" its intention to grant the immunity claimed, will admit of a different interpretation, reasonable in its character, and valuable in its results to that Com-

pany and its stockholders in general. It perpetuates for twenty years the provisions of section 4 of the act of 1867,

"That the stock and other interest the city has, or may have, in the gas-works, shall not be disposed of; but the dividends arising therefrom shall, as far as necessary, be applied to paying for the public lights of the city; and all investments of unused dividends belonging to the city shall be made by the directors of the Gas Company, as trustee, with the concurrence and advice of the City Council, and held as a permanent trust during the continuation of this charter."

This irrepealable limitation upon the powers of a single stockholder withdraws all the stock of the city from the stock market, and relieves the individual stockholders from all possible competition, so far as two fifths of all the capital stock of the Company is concerned, for the period of twenty years. It leaves the Company to apply the dividends declared to the city to the payment for the public lights, and then to control for twenty years any surplus or excess of dividends that may remain in its hands.

It was to protect the Company and the preferred stockholders in these exceptional advantages that the Legislature was induced to enact

"That no alteration or amendment of the charter of the Gas Company shall be made without the concurrence of the City Council and the directors of the Gas Company."

This interpretation not only reconciles the charter of the Gas Company with the act of 1856, but validates the act of 1872 under which the defendant in error claims its corporate and chartered rights.

All the presumptions are in favor of the validity of its charter; and before the Courts will be warranted in declaring it void, as against the provisions of the Federal Constitution, its repugnancy thereto must be clearly and conclusively shown.

In the case of *Ogden vs. Sanders* (*12th Wheaton*, 270), where it was claimed that a State law was in conflict with

the Constitution of the United States, Mr. Justice Washington said:

"It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

The act of 1872 is clearly not in conflict with the Federal Constitution upon its face. But the plaintiff in error undertakes to show that certain other antecedent acts constituted a contract between it and the State of Kentucky, the obligations of which cannot be impaired by subsequent legislation, because those antecedent acts *plainly express* the intention of the Legislature to grant to such plaintiff immunity from governmental control. This last proposition it must establish "beyond all reasonable doubt," or at the least so conclusively that the Court shall feel a clear and strong conviction that the Legislature intended to surrender to this corporation a comprehensive power retained by a general law to enable the State to control at will the exercise and enjoyment of all corporate franchises and privileges thereafter granted.

It is submitted, this proposition has not been and cannot be so established, or, in fact, established at all.

In the construction of the act of 1856, and the charter of the plaintiff in error, as amended by the act of 1869, the reasoning of Lord Brougham in *Thornhill vs. Hoyle* (*2d Clark and Finnelly's House of Lords Reports, page* 36), applies with striking force. His Lordship said:

"I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed, in one part of an instrument, by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt;

in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you deal in probabilities. But you must show something, in another part of the instrument, which is decisive the one way, as the other terms were decisive the other way; and that the interest first given cannot be taken away, either by *tacitum*, or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*."

The reservation of power contained in the act of 1856, and by operation of law carried into every charter subsequently granted a private corporation, being clear, unambiguous, liable to no doubt, and clouded by no obscurity, and which by the letter of the act is to exist in all cases unless a contrary intention be plainly expressed, is not to be treated as waived in favor of the Louisville Gas Company upon a mere show of possibility or of probability. That Company must show something in its amended charter which is as decisive the one way as the act of 1856 was decisive the other way. The reserved power "cannot be taken away, either by *tacitum* or by *dubium*, or by *possibile*, or even by *probabile*, but it must be taken away, and can only be taken away, by *expressum et certum*."

This Court will observe that the act of 1872 does not revoke or abridge in any respect any contract right secured to the Gas Company or to the city of Louisville. It does not interfere with the free exercise or perfect enjoyment of any corporate franchise or property right conferred or recognized by the acts of 1867 and 1869, or by either of them.

Every power granted the Citizens' Gas-light Company may be exercised without interfering in any way with any one of the franchises, property rights, or immunities of the Louisville Gas Company. Its only exclusive grant was the *privilege* of erecting and establishing gas-works in the city of Louisville during the continuance of its charter, and of

vending and supplying coal gas-lights to the city and its citizens during that period of time. The grant to the Citizens Gas-light Company abridges that *privilege*, and terminates its exclusive character, but affects no franchise or property or contract right of the Gas Company. The proviso to the first section of the act of 1856 shows an express reservation of the right by the Legislature to abridge that privilege. It is in this language:

"*Provided*, That whilst privileges and franchises so granted "may be changed or repealed, no amendment or repeal "shall impair other rights previously vested."

The act of 1872 is strictly within that reservation of power. It leaves the plaintiff in error in full possession of all its property, with perfect freedom to control it and its incomes, as provided for by its charter. It leaves it in the complete enjoyment of all its contract rights, and with the unquestioned privilege of keeping and maintaining gas-works in, and of manufacturing and vending coal gas-lights to the city and citizens of Louisville. It goes no further than to admit within the prescribed territory a competitor, who may also keep and maintain gas-works, and manufacture and sell gas-lights to such citizens and corporations of the city of Louisville, as may be free to contract for their purchase.

To conclude the argumment upon this branch of the case, it is submitted—

First. That the acts of 1856 and 1869 can be harmonized and reconciled, and the 5th and 6th sections of the act of 1869 given proper force and effect, consistently with the existence of the reserved power in the Legislature to repeal or abridge the exclusive privilege granted for the time being by the said 5th section.

Second. That the act of 1869 does not plainly express, or express at all, an intention by the Legislature to surrender the power to change or repeal or disregard at will the privilege in question, or any privilege or franchise granted by the acts of 1867 or 1869.

Third. That the grant to the defendant in error, evidenced by the act of 1872, in so far as it abridges the exclusive privileges theretofore enjoyed by the Louisville Gas Company is, and was, clearly within the power reserved to the Legislature of Kentucky by the act of 1856.

Therefore, that the judgment of the Kentucky Court of Appeals, for these reasons, ought to be affirmed.

POLICE POWER.

Independent of the satisfactory ground upon which the Court of Appeals rested its decision, there is another, and, we submit, conclusive reason, why the judgment of that Court should be affirmed. Legislative restrictions upon and regulations of the business of manufacturing and vending illuminating gas, are the proper and necessary exercise of the police powers of the State. Such business affects the health of the local public. It is intimately connected with the preservation of the public peace, and the power and duty of controlling it in the interests of the public, can neither be surrendered, sold, or bargained away.

Each succeeding Legislature must be left free to act in the matter according to its conception of existing public exigencies.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demands the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." (*Beer Co. vs. Mass.*, 97 *U. S.*, 25–28.)

This doctrine has been approved by this Court in the subsequent cases of *Stone vs. Mississippi*, 101 *U. S.*; *Fer-*

tilizing Company vs. Hyde Park, 97 *U. S.*; and *Butchers' Union Co. vs. Crescent City Co.*, 111 *U. S.* In the last named case the Court thus states the rule:

"While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to the subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the *public health* and *public morals* The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

The propriety of, and the necessity for the rule indicated, as well as its correctness, are so well established by the repeated adjudications of this Court, that it would be a waste of time to support it by further argument or citation.

I shall, therefore, pass to the consideration of the questions, whether the supply of illuminating gas to the uses of the city and the inhabitants of Louisville, affects, or is likely to affect, the health of the local community, and whether such supply tends to preserve morals, protect property, and to suppress crime. If it does either of these things, then the business of supplying it to the city and its inhabitants may be controlled and regulated by the Legislature in the exercise of the police power of the State; and the power to control and regulate it exists at all times, without regard to any antecedent attempt on the part of the Legislature to abdicate or to bargain it away.

That health may be affected by gas used for illuminating purposes, is a proposition too clear to admit of dispute. The question never is, whether a particular character of gas is wholly free from all deleterious influences upon health, but which of the several kinds offered to the consumer approximates the more closely to absolute purity.

In their work on Medical Jurisprudence, Wharton and Stille treat of illuminating gas as a poison, more or less active, according to the substance from which it may be produced, and proportioned to its relative approximation to purity. (Secs. 547–549, vol. 2, edition 1882.)

They cite a striking instance of the fatal effects of a break in a main in the street, from which the gas penetrated through the soil and into a neighboring house. (*Ib., sec.* 609.)

In addition to the deleterious effects of inhalation, the explosive character of gas renders it one of the most dangerous agencies that have been utilized for the comfort and convenience of mankind, and puts it upon a like footing with gunpowder, dynamite, and their kindred compounds. In one sense, therefore, the manufacture and sale of illuminating gas is an unwholesome trade or business, as it affects health, and in another a dangerous avocation, as it tends to accidental explosions, destructive of human life and property.

The regulation of such a business is clearly within the police power of the State.

Says Chancellor Kent:

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his as not to injure his neighbors; and private interests must be made subservient to the general interests of the community."

This elucidation of the extent of the police power, as well as that given in *Thorpe vs. The Railroad Company* (27 *Vt.*, 149), to the effect that—

"It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; * * * * * and persons and property are subjected to all kind of restraint and burden in order to secure the general comfort, health, and

prosperity of the State. Of the perfect right of the Legislature to do this, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned,"

received the express commendation of the majority of this Court in the *Slaughter House cases* (16 *Wallace*, 62, 63), and again in the case of the *Butchers' Union and Crescent City Co.* (11 *U. S.*, 746).

Testing the business of manufacturing and vending gas by the extract from Kent's Commentaries, it will be found to come within the reason of each of the instances cited by the learned Chancellor. It is unwholesome, and the product is offensive to the senses; explosive like gunpowder, and combustible in the highest degree. Unrestrained and unregulated by law, and conducted upon the principle of selfish desire for gain, the business is dangerous to the comfort, health, and safety of the local community. But regulated and restrained, and conducted with skill and prudence, it adds to the comfort and convenience of the people, without detriment to their health, and becomes a potent agent in the protection of life and property, and in the suppression of crime.

Speaking of the effect of the introduction of gas-lights into the city of London, Mr. Charles Knight says:

"*The adventurers in gas light did more for the prevention of crime than the government had done since the days of Alfred.*" (*History of England, vol. 8, page 66.*)

We have but to contrast the condition of the streets in populous cities in the way of crime and disorder prior to the general introduction of gas-lights three quarters of a century ago, with their condition in these regards at the present time, to see and appreciate the beneficial results following that introduction in the way of suppressing crime and giving security to person and property.

These considerations, the injurious results which follow the negligent or reckless manufacture and distribution of gas-lights on the one side, and the incalculable benefits

flowing from their prudent manufacture and sale on the other, have made the business the subject of legislative control and regulation from the beginning.

A company was formed in London to manufacture and supply illuminating gas in 1810. Three years afterwards gas-lights were used on Westminster bridge. In 1814 they were used to light the streets of Westminster. In 1816 the use of such lights in the city of London became general, or at least common, and in a few years gas-lights were introduced into all the principal cities in the Kingdom of Great Britain, so far as streets, shops, and public buildings were concerned. (*Encyclopædia Britannica, vol.* 10, page 88.)

Cotemporaneous with the general use of gas-lights in Great Britain commenced the statutory regulation of their manufacture, supply, and price. In the 4th volume of Jacob Fisher's Digest (page 5687), more than a dozen acts of Parliament upon this subject are referred to. They begin with the act of 11*th George*, 4 *c.*, 27, and continue down to the gas-works clauses act of 1871.

Similar statutes have been enacted and enforced in many of the American States. As to the acts in force in 1882, reference is made to the compilation in Greenough's Digest of Gas cases, commencing on page 189. See also the following cases: *State vs. Columbus Gas Co.*, 34 *Ohio St.*, 572; *State vs. Ironton Gas Co.*, 37 *Ohio St.*, 45; *Sickles vs. Manhattan Co.*, 64 *How., p.* 33; *Foster vs. Gas Co.*, 12*th Phil*, 511.

Counsel is not advised as to the position the plaintiff in error will maintain in this Court as to question now being considered. In the State Courts it contended that to supply gas-lights for the streets and public places of the city of Louisville, and for the use of the inhabitants of that city, was to minister to the public welfare, to subserve the public convenience, promote the comfort of the people, and to aid in the suppression of crime. In the petition filed in the Court of Appeals for a rehearing, we find this language:

"The streets of Louisville are its highways. That it is a governmental duty to make the highways safe, is universally admitted. The gas is absolutely essential to the safety of the streets. Remove the gas-posts and gas-lights, and our highways would become the prey of robbers, thieves, and thugs, and no one would be safe in passing along them. Commerce would be subject to the depredations of the vicious classes of a metropolitan population, and life itself would be exposed to continual hazard of violence. We boldly assert that it is the duty of the Government, by its own agents, or through the medium of individuals or corporations, to provide for the safety of the streets and the security of life and property; and we do not hesitate to say that upon the principle of safety to the community and benefits to the public, it would be the duty of the Government to place lights on all the highways of the State, were it necessary to do so to secure the safety of life and property, or for the transaction of the business of the country." (Printed record, page 79.)

This line of argument was pursued with like earnestness and ability throughout the entire petition. (See pages 80, 81, 82, and 83, printed record.)

After discussing the utility and importance of the business of telegraphy, the petition continues (page 81):

"This language is equally applicable to the system of public lights by gas, now employed in all the large cities of this country. It cannot be dispensed with. It is a necessity in our 'highly organized commercial and social life, and has become as general and as important as the mail.' So long as our civilization progresses and develops, so long will new public wants and necessities arise; and as long as this continues, so long will it be the duty of the Government to see that these wants are properly met, either by its own agents, or through the medium of individuals and corporations charged with the performance of the duties and services which it would be proper and the duty of the Government to render to the public."

Accepting these arguments and illustrations as having some foundation in reason and in fact, we answer that these "duties" are continuous in their character. The obligation to perform them does not cease with a single exercise of legislative power. They pertain to the public welfare, in

that they tend to the preservation of the public health and of the public morals, to the prevention and suppression of crime, and the protection of person and property; and, therefore, it cannot be permitted that the power which enables the Legislature to perform them,

"Can be sold, bargained away, under any circumstances, "as if it were a mere privilege which the legislator could "dispose of at his pleasure."

Generally speaking, gas cannot be successfully distributed to consumers without license from the public authorities to put down and maintain pipes and mains in the streets and public ways of towns and cities. This fact necessarily subordinates the manufacturer, whether an individual or a corporation, to the direct operation of the police regulations. His business cannot be carried on without the consent of the local authorities. The service rendered is one in which the public have an interest, and one which the State (though in nowise bound thereto) might render within the limitations of its municipal powers.

All these considerations concur to establish, not only the propriety of, but the necessity for, the legislative control and regulation of the business of manufacturing and vending illuminating gas.

New Orleans vs. Clark (95 *U. S.*, 644) was a case in which the city of Carrollton had contracted with a gas company to light the city and supply the citizens with gas-light, and had issued and delivered to the company certain of its bonds. The validity of these bonds was questioned, and the power of the State Legislature to legalize their issue was denied. In passing upon these questions this Court said:

"The invalidity of the bonds was asserted, as already stated, on two grounds: First, that they were issued in aid of a private corporation; and second, that the city of Carrollton, in issuing them, created a debt without providing in the same ordinance the means of paying its principal. The first of these grounds is not one which affects the

validity of the bonds. A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and though such works may be used by the corporation for its own gain, yet as they advance the public good, the corporation may be properly aided in their construction by the city."

This declaration rests upon the manifestly correct assumption that a supply of gas-light is needed for the health, comfort, and convenience of the people of a city, and, therefore, that the right to provide it for them, and to regulate the methods by which it may be provided, exists as one of the police powers of the State.

A striking exercise of legislative power in this regard, was considered and upheld by the New York Court of Appeals, in the case of the *Richmond Gas-light Company vs. Middleton* (59 *N. Y.*, 228)

Under an express legislative grant, unlimited as to time, the municipality contracted for a supply of gas to light its streets for the term of five years. The Legislature repealed the act granting the authority to make the contract, and the Court held that it was thereby annulled, and the city thereby relieved from its obligations, although the time for which the contract was made had not expired.

Discussing the character of the business of making and vending illuminating gas, and the obligations of a gas company to the public, the Supreme Court of Wisconsin, in *Sheppard vs. Milwaukee Gas-Light Co.* (6 *Wisconsin*, 593), used this language:

"From the nature of the article, the objects of the company, their relation to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation."

In the subsequent case of the *State vs. The Milwaukee Company* (29 *Wisconsin*, 454), an exclusive privilege, like the one here in contest, was upheld as not *per se* void, because of the character of the services to be rendered, and

of the existence in the Legislature of the power to repeal or revoke it.

Except in regard to the performance of duties resting upon the State in its sovereign character, such as the maintenance of highways, bridges, ferries, &c., it is not in the power of the State Legislatures to confer upon any person or association an irrepealable monopoly.

It is the settled doctrine of the best considered American cases, that an exclusive privilege to carry on a particular business cannot be constitutionally conferred, unless the grantee either undertakes to render service affecting the public interests or the health or morals of the community, or the safety of person or property. And whenever the service or business does affect either the health or morals of the people, or endanger the safety of person or property, or interfere with the comfort or convenience of the public, the right to revoke the grant, or to take away from it the exclusive character, must and does continue at all times to exist in the Legislature, notwithstanding any contract, agreement, or stipulation to the contrary. It is a right of which the Legislature cannot divest itself. It is a discretion which cannot be bargained away.

Such being the case, the question as to whether the charter of the plaintiff in error constitutes a contract between it and the Commonwealth, that the grant shall continue exclusive till the 1st of January, 1889, as well as the question whether it rested upon a sufficient consideration, is wholly immaterial.

In the case of the *Butchers' Union Co. vs. Crescent City Co.* (111 *U. S.*), this Court, by Justice Miller, said:

"No one can examine the provisions of the act of 1869 with the knowledge that they were accepted by the Crescent City Company, and so far acted on that a very large amount of money was expended in a vast slaughter-house, and an equally extensive stock-yard and landing-place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration.

"It admits of as little doubt that the ordinance of the city of New Orleans under the new Constitution impaired the obligation imposed by those provisions on the State by taking away the exclusive right of the Company granted to it for twenty-five years, which was to the Company the most valuable thing supposed to be secured to it by the statutory contract.

"We do not think it necessary to spend time in demonstrating either of these propositions. We do not believe they will be controverted."

Yet, in the face of all this, the Court held the contract, in so far as the exclusive right was concerned, to be repealable at the will of the Legislature, because the business covered and protected by the grant affected the public health, and because—

"It cannot be permitted that, when the Constitution of a State, the fundamental law of the land, has imposed upon its Legislature the duty of guarding by suitable laws the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure."

III.

NO CONSIDERATION.

The question here differs from that involved in the Slaughter-house cases, in the fact that the grant of the exclusive privilege rests upon no consideration, valuable or otherwise.

The act of 1867 was duly accepted, and the new corporation commenced to do business under it on the first day of January, 1869. By the act of acceptance, the stockholders of the old Company devoted their common property to the new corporate uses, and in consideration of the benefits and advantages conferred, undertook that the new corporation should perform all the duties, and rest under all the obligations to the public imposed by the said act of 1867. The

act of 1869 imposed no additional duty or obligation. It was but the grant of additional privileges and advantages. The skill of the draughtsman obscures this fact; but a comparison of its provisions with those of the charter of 1869, will demonstrate its existence. Section 2 of the act of 1869 requires the Company to extend its main pipes whenever the public and private lights immediately arising therefrom will pay seven (7) per cent. profit on the cost of the extension. The act of 1867 did not require such extensions, unless the new business would pay eight (8) per cent. on the cost.

Section 3 of the act of 1869 was a re-enactment of section 8 of the charter of 1867, with three material changes. They each provide that the city shall pay for the gas used to light the street lamps, the actual cost thereof, and no more. But the latter act substituted for the further limitation contained in the 8th section of the act of 1867, to which attention will presently be called, the provision that, in no event, shall the charge for street lights furnished exceed the sum of thirty-five ($35) dollars per lamp. These changes are ostensibly to the disadvantage of the Gas Company. But they are not in fact so, and were not intended to be so. The eighth section of the act of 1867, after providing that, for gas furnished the street lamps, the Company should receive only the actual cost, contained this further limitation:

"These charges shall not exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, nor shall the price charged other consumers of gas be greater than the average price of gas charged such consumers in said cities."

This meant that gas-lights should be furnished the city and the private consumers at the average price of gas-lights in the cities named, and that the price in Louisville should be reduced as the average of the prices might be reduced from time to time in those cities. (*Worcester Gas-light Co. vs. City of Worcester*, 110 *Mass.*, 353.)

The result would have been (under this regulation), that competition in those cities, and the consequent reduction of prices, would have resulted to the direct benefit of the city and citizens of Louisville. If this provision had been left in force, little or no detriment would probably have resulted to the consumers of gas-light in the city of Louisville, from the grant of the exclusive privilege contained in the act of 1869. But this provision was stricken out, and in its room we have the following:

"And the charge for gas to private consumers shall be so graded as that the Company's profits shall not exceed twelve per cent. per annum on the par value of the stock: ten (10) per cent. of which may be drawn by the stockholders, in semi-annual dividends, and the other two per cent. to be laid out for extensions, and not be capitalized except at the end of every five years." (Sec. 3, act 1869)

Following this, comes the provision of the fifth section of the act:

"That said Gas Company shall have the exclusive privilege of erecting and maintaining gas-works in the city of Louisville, * * and of vending coal gas lights and supplying the city and citizens with gas by means of public works."

By this act of 1869 the private consumers were deprived of the advantages to result to them from competition between the manufacturers and venders of gas-lights in the five cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis; also of the possibility of competition at home. They were then subjected to such charges by the Gas Company as might be necessary to make good the difference between the seven and eight per cent. annual profit on the cost of future extensions; also to make up any loss that might result from lighting the street lamps at thirty-five dollars per lamp; also to raise the two per cent. accumulation to be laid out for extensions; and finally, to pay to the stockholders a ten per cent. dividend annually upon the par value of their stock—a profit nearly double

the prevailing rates of interest, or of profits upon well secured twenty-year investments.

Instead, therefore, of imposing additional or more burdensome obligations upon the Gas Company, the act of 1869 relieved it from all the restrictions intended to protect the private consumers of gas against extortionate charges, and then attempted to secure to it the twenty-year exclusive privilege. This privilege was the baldest gratuity. It was conferred at the instance of the stockholders of the corporation, and in utter disregard of the interests of the citizens and residents of the city of Louisville.

It was the duty, and it was within the power of the Legislature, to take advantage of the first opportunity to terminate the supposed exclusive privilege, and relieve the local public from its oppressive consequences.

Whatever difficulties may stand in the way of the revocations of privileges tendered to proposed corporations, which are afterwards accepted in accordance with the terms of the tender, it is certain that privileges conferred upon a corporation already organized and engaged in the prosecution of the corporate business may be recalled, unless some new consideration passes to the State, or unless the corporation or the stockholders assume some new duty, or incur some additional liability upon the faith of the non-revocation of the proposed privilege or exemption.

A corporation can no more demand the continued performance of a *nudum pactum* than can an individual.

In the absence of a consideration, an amendment to the charter of an organized corporation does not import a contract between the State and the corporation. Discussing this question, the Supreme Court of Pennsylvania, in the *Phila. Co. Case* (102 *Penn. St.*, 129), used this language:

"There is reason and authority for holding that a supplement to a charter of a corporation, which merely confers upon it a new right or enlarges an old one, without imposing any new or additional burden upon it, is a license or promise by the State, and may be revoked at pleasure. It

is without consideration to support it, and cannot bind a subsequent Legislature. (*Johnson vs. Crow*, 6 *Norris*, 184; *Christ Church vs. Phil.*, 24 *Howard*, 300.) In the present age of corporate greed, it would be dangerous to hold the contrary doctrine. Were we to do so, corporations, instead of being the creatures of the State, might become its masters."

In this connection see also 87 *Penn. St.; People vs. Commonwealth*, 47 *N. Y.*

An act of incorporation does not *per se* constitute a contract between the State and the grantee. It may contain such a contract; but in all cases, and especially where the claim is asserted under a supplement or amendment, the burden is upon the corporation to show the necessary consideration. (*Newton vs. Commissioners*, 100 *U. S.*, 561.)

The presumptions are against the claim.

"Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim."

It may be said that the cases of *Tucker vs. Ferguson; Christ Church vs. Philadelphia; Newton vs Commissioners*, and in fact the other principal cases cited in this connection, are instances of exemptions from taxation, and that such exemptions are not favored, inasmuch as the power of taxation is essential to the existence of government.

But neither are grants of exclusive privileges the objects of judicial favor. When, as here, they relate to callings or avocations in which the general public have a direct interest, they are looked upon with the greatest disapprobation. Especially so when they prevent competition, and increase the price of an article or product entering into the daily consumption of almost every family, rich or poor, in the particular locality in which they are made to operate.

The highest considerations conduce to the support and maintenance of the act of the Kentucky Legislature terminating the supposed grant of the exclusive privilege claimed by the plaintiff in error, and the want of the necessary consideration to give it the sanctity of a contract, authorized and made it the duty of the Kentucky Appellate Court to adjudge that the act incorporating the Citizens' Gas Light Company was free from all constitutional objections.

UNCONSTITUTIONAL MONOPOLY.

That it is proper exercise of power, and that it is in a certain sense the discharge of a public duty for the Government to cause the streets of populous cities to be lighted, is not denied; but such a duty differs essentially from that of providing public highways, bridges, ferries, &c. Those are works not open to individual enterprise. They are not matters of common right. Express legislation is necessary to enable an individual or a private corporation to construct and control a public road, or to erect and maintain a toll-bridge, or to establish and operate a public ferry. Each and all these things, however, the Government may cause to be done through the instrumentality of an individual or corporation. About them, or either of them, it may contract, even to the extent of conferring upon the grantee exclusive rights or privileges. Such grants do not conflict with the natural rights of the citizen, as the privileges bartered away are such as pertain to the prerogative rights and powers of Government, and are incapable of being exercised or enjoyed without its express consent.

But to supply gas-lights to a city, or to the inhabitants thereof, is to engage in a business or avocation which no State Government has ever monopolized or claimed the right in its governmental character to monopolize.

"It is not a prerogative of government. Like the manu-
"facture and sale of any other ordinary article of traffic, it
"is open to all, and may be carried on by any person with-

"out legislative authority." (*Jersey City Gas Co. vs. Dwight*, 29 *New Jersey Equity*, 248.)

If it be necessary to use the streets of a city to make provision for the distribution of the gas-lights offered for sale, the manufacturer will, of course, be compelled to obtain the necessary license from the municipal authorities or from the State Legislature. But subject to this difficulty, the manufacture and sale of gas-lights are as free to all who choose to engage in the business, as the manufacture and sale of gasoline or any other preparation used for lighting purposes.

That it may be controlled and regulated under the police power of the State is freely conceded, and that the State may, from time to time, declare who or what number of persons shall engage in the business in a particular locality, is a proposition not necessary to be disputed. But this grows out of the fact that the business is one which may affect the public health, and which may endanger the safety of person and property upon the one hand, and which tends to the improvement of the public morals, to the promotion of the public peace, and to the suppression of crime upon the other; and which, for these reasons, must at all times remain subject to the control of the Legislature.

If this position be not the correct one then it must follow that an exclusive privilege to manufacture and sell coal gas-lights in a particular city constitutes a monopoly in a business or avocation, ordinary and usual in its character, and which, as matter of strict right, is free to all persons who may choose to engage therein. (*Norwich Gas light Co. vs. Norwich City Gas Co.*, 25 *Conn.*, 19; 29 *New Jersey Equity*, 248.)

The grant of such a privilege is as clearly unconstitutional in this country as it is illegal and void in England.

Independent of the discharge of duties strictly governmental in their character, and of the legitimate exercise of the police power, the Legislature can no more declare from whom, or from what class of persons purchases shall be

made, than it can fix the prices of the commodities purchased.

The grant of a monopoly is *prima facie* void, as against common right, and in conflict with the constitutional provisions, State and Federal, intended to secure equality of rights and privileges in the citizens, and to protect persons against being deprived of their liberty or property without due process of law.

A law which prohibits all persons, except a favored grantee, from adopting a lawful employment, or engaging in a lawful business, deprives them of their liberty to enjoy their right of choice in the avocations of life, and denies to them the equal protection of the laws.

Discussing a proposition similar to this, Mr. Justice Bradley, in his dissenting opinion in the Slaughter-house cases (16 *Wallace*), said:

"The Declaration of Independence, which was the first "political act of the American people in their independent "sovereign capacity, lays the foundation of our national "existence upon this broad proposition: 'That all men are "created equal; that they are endowed by their Creator "with certain inalienable rights; that among these are life, "liberty, and the pursuit of happiness.' Here again we "have the great threefold division of the rights of freemen "asserted as the rights of man. Rights to liberty and the "pursuit of happiness are equivalent to the rights of life, "liberty, and property. These are the fundamental rights "which can only be taken away by due process of law, and "which can only be interfered with, or the enjoyment of "which can only be modified by lawful regulations necessary "or proper for the mutual good of all; and these rights, I "contend, belong to the citizen of every free government. "For the preservation, exercise, and enjoyment of these "rights the individual citizen, as a necessity, must be left "free to adopt such calling, profession, or trade as may "seem to him most conducive to that end. Without this "right he cannot be a freeman. This right to choose one's "calling is an essential part of that liberty which it is the "object of Government to protect; and a calling, when "chosen, is a man's property and right. Liberty and prop-"erty are not protected where these rights are arbitrarily "assailed."

In the same case, Mr. Justice Field, after commenting upon the effect of the fourth article of the Constitution in securing to the citizens of the several States equal rights and privileges in each of the States, continued:

"Now, what the clause in question does for the protection of the citizens of one State against the creation of monopolies in favor of citizens of other States, the Fourteenth Amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States—of every one of them—is secured against abridgment in any form by any State. The Fourteenth Amendment places them under the guardianship of the national authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at the common law in the great case of the monopolies during the reign of Queen Elizabeth."

The absolute accuracy of these declarations of the dissenting Justice was not questioned by the majority opinion. Upon the contrary, the grant assailed in that case was held to be within the power of the State—

"Expressly on the ground that it was the exercise of the "police power which had remained with the States in the "formation of the original Constitution of the United "States, and had not been taken away by the amendments "adopted since." (*111th U. S.*, 747.)

Continuing my argument upon the hypothesis of the plaintiff in error, that the grant to the Louisville Gas Company is not subject to legislative control, as within the police power of the State, I insist it is an allowance by a grant from the sovereign power of the State to a corporation, by which the exclusive right to manufacture and sell an unpatentable article of commerce or trade is attempted to be secured, and is, therefore, in the strictest sense, an illegal monopoly according to all the common law definitions.

In the case of the monopolies, the Court said:

involving no Federal question. They depend alone upon the practice prevailing in the Courts of the State, and the action of the Court of Appeals upon each of them concludes this and all other Courts. No time will therefore be devoted to their discussion.

For the several reasons indicated in the argument submitted, an order of affirmance is asked.

WM. LINDSAY,
For Defendant in Error.

BROWN & DAVIE,
Of Counsel.

☞ For Kentucky Statutes discussed in the foregoing brief, see Addenda.

ADDENDA.

AN ACT reserving power to amend or repeal Charters and other Laws.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That all charters and grants of or to corporations or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

§ 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

§ 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage.

Approved February 14, 1856.

CHAPTER 1179.

AN ACT to extend the charter of the Louisville Gas Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That the following charter be granted to the present Louisville Gas Company, to take effect at the expiration of the present charter, on the first day of January, 1869: *Provided*, The city of Louisville does not exercise its privilege to purchase the same in accordance with the terms set forth in article 18 of the present charter.

§ 2. That a company shall be, and the same is hereby, incorporated, with a capital of fifteen hundred thousand dollars, to be divided into shares of fifty dollars each, to be owned by individuals, companies, and corporations; they and their successors and assigns shall be, and they are hereby, created a body-politic and corporate, by the name and style of the Louisville Gas Company, and shall so continue for twenty years from the first day of January, 1869; and by that name and style, under the restrictions hereafter prescribed, shall be capable to contract and be contracted with, sue and be sued, plead, answer, and defend, in all courts and elsewhere, as natural persons; and may have and use a common seal, and change, alter, and renew the same at pleasure; and may ordain and put in execution such by-laws, rules and regulations, for the good government of said company, and for the efficient management of its affairs and prudential concerns, as may be deemed expedient, not contrary to the Constitution or laws of this State or of the United States.

§ 3. That the capital of fifteen hundred thousand dollars shall consist, first, of the stock of the present Louisville Gas Company on the 31st of December, 1868, at par value; secondly, of the contingent fund and undivided profits that the same company may own at the expiration of its present charter. Said fund to be capitalized *pro rata* for the benefit of the present stockholders, except fractional parts of shares, which shall be paid in cash; and, thirdly, new stock may be issued and sold by the new company when required, to the extent of the capital stock; the sales to be made at public auction, after ten days' notice in the city papers. Should such stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale of said stock.

§ 4. That said company shall keep an office in the city of Louisville, and its business shall be to make and furnish gas to the city of Louisville, and residents thereof, and vend the same; and said company shall have the right to purchase and hold such real and personal property as may be necessary, proper, or convenient in the carrying on and transacting its said business.

§ 5. The Gas Company shall, within two years after this charter takes effect, be required to extend the gas distribution to Portland, and lay down street mains along the Portland avenue to the intersection of Third and Fulton

streets, Portland; thence along Third street to Commercial street; thence north on Commercial street to Water street; thence down Water street to Grove street, including the erection of public lights.

§ 6. The company may extend the main pipes for distributing the gas, when, in their judgment, it may seem fit; but shall not be bound to extend the same until the private and public lights required by the citizens will pay eight per cent. profit on the cost of the extension; and whenever an extension is required, the company shall furnish the proper estimates; and when the sum required shall be subscribed, the company shall be bound to make the extension until their capital stock is absorbed in the gas-works and extensions.

§ 7. That to enable the company to construct, continue, and extend its gas-works in the city of Louisville, it is authorized to continue the use of the pipes and conductors which may have been laid down; and, with the consent of the city council, to own and extend its pipes and conductors through the other streets and alleys of said city; and for that purpose to take up the pavements and to replace the same; and shall be responsible to the city for any damage which may arise therefrom, or any unreasonable delay in replacing the same; and said company shall be subject to the regulations of the city as to the streets and alleys, and to the same ordinances and penalties that individuals may be subject to: *Provided*, All extension of pipes and conductors shall be made with the consent of the general council of the city.

§ 8. The Gas Company shall put lamp-posts, fixtures, etc., along the street mains as they are extended, at a distance apart of about two hundred feet, or as near that distance as the dimensions of the squares may admit, so as to make an equal distribution of the same; and whenever there are street mains on both sides of the streets, the lights are to be located so as to alternate, preserving the same distance—namely, about two hundred feet for the lamps on each side of the street. The Gas Company are to keep the lamps in order, to furnish gas, and light and extinguish the same, giving to each light an illuminating power of about twelve sperm candles; and the time of burning shall be from the close of twilight at evening until dawn of day in the morning, except on clear moonlight nights, or parts of nights, when the moon shines clear and bright, when the light may be dispensed with; and shall charge and receive therefor from the city of Louisville

only the actual cost thereof. These charges shall not exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, nor shall the price charged other consumers of gas be greater than the average price of gas charged such consumers in said cities.

§ 9. A gas inspector or inspectors shall be appointed, whose duty it shall be to examine into all supposed errors in the gas bills of consumers, and correct the same, when called upon by the consumer for that purpose. The manner of appointing and the remuneration of said inspector or inspectors, is to be made in such manner as the city council of Louisville and the Gas Company may agree upon.

§ 10. That if any person or persons shall willfully, by any means whatever, injure or destroy any part of the gas pipes or conductors, lamps, lamp-posts, burners, or any of their works or fixtures or machinery, all such persons shall be bound to the company for all damages sustained thereby, and may furthermore be liable, within two years after the commitment of the offense, and, upon conviction, shall be fined in any sum, at the discretion of the jury, not exceeding one thousand dollars, or by imprisonment in the city work-house, at hard labor, not exceeding five years; but this section shall not be held to change the law as to arson, or willfully burning the houses of the company: *Provided*, That so much of this section as imposes imprisonment shall not apply to infants.

§ 11. The stockholders, exclusive of the city of Louisville, may elect five (5) directors, and the general council of Louisville four (4) other directors, and these nine directors shall choose from among themselves a president; and to said directors shall be intrusted the real and personal estate, business, property, funds, and financial concerns of said company, and the administration of its affairs. All the directors shall be stockholders to the amount of twenty shares each, in their own right, and, after their first election, shall have been stockholders not less than three months before the election at which they are chosen. They shall serve for one year, and until their successors are chosen; and after the first election there shall be an annual election on the first Monday of January in each year, of which notice shall be given for ten days in the newspapers printed in Louisville; and the city council shall, at their first regular meeting after the first Monday in January, elect the four directors on the part of the city.

The president and directors shall fill all vacancies that may arise in their body from death, resignation, removal from the city, or the failure to meet their engagements to the company with promptness; and it shall be the duty of the other directors to declare the seat of a director vacant for that cause, or for a removal from the city. This, however, excepts those vacancies occurring among the directors appointed by the city, which vacancies are to be filled by the general council of the city. That each share of stock in this company shall entitle the owner to one vote; and no one individual, company, or corporation, other than the city of Louisville, shall hold more than two thousand shares of the stock, either directly or indirectly; and if any one shall purchase and hold more, except the city, he shall forfeit his dividends on such excess of stock to the Gas Company.

§ 12. That certificates of stock shall be issued to the holders thereof whenever the same shall be paid for; and stock in this company shall be considered and pass as personal estate, and shall be transferable on the books of the company, in such manner as the stockholders, or president and directors, by their by-laws, prescribe; but no stock shall be transferable until all the debts and demands of the company are discharged; and for all debts and demands the company shall have a lien on the stock. That on the second Monday in July and January in each year, the company shall make a statement of the affairs of the company, and furnish the same to the stockholders, and to the city council, at which time the semi-annual dividend shall be declared.

§ 13. That the president and directors shall keep a record of their proceedings, which they shall produce to the stockholders at the regular or called meeting, and to a committee of the general council, at any time during the business hours of the day, for examination or inspection.

§ 14. That if any officer of this company shall, without the authority of the president and directors, appropriate any of the funds of the corporation to his own use or that of any other person, shall willfully fail to make correct returns, or shall knowingly make false returns on the books of the company, with intent to cheat or defraud the corporation or any person, or to hide or conceal any improper appropriation of the funds of the corporation, the officer so offending shall be deemed guilty of felony, and, upon conviction thereof, be sentenced to confinement in the jail and penitentiary of this State for a period not less than two nor more than twenty years.

§ 15. That the directors shall allow to the president a reasonable compensation for his services; but no compensation shall be allowed to a director, except by the order of the stockholders; and if the president or any of the directors shall knowingly diminish the capital stock by dividends or otherwise, they shall be responsible to the stockholders for the deficiency thus created.

§ 16. Reports of the finances and affairs of the company may be required by the Legislature, and the Legislature shall have the right, by its committees, to investigate the condition of the company; and any violation of the essential provisions of the charter shall cause forfeiture; but no forfeiture shall prevent the corporation from collecting its debts and enforcing its contracts, and disposing of its effects.

§ 17. That the Louisville chancery court shall have jurisdiction to hear and determine alleged forfeiture of this charter, on complaint of any stockholder, or State of Kentucky.

§ 18. That the stock in the hands of the stockholders is exempt from all State tax, and in lieu thereof, the State impose a tax on the capital stock paid in of fifty cents on the hundred dollars; said tax to be collected from the Gas Company, and when paid, to exempt the property and effects of the company from any additional tax.

§ 19. The city of Louisville, if it so elect, may purchase the gas-works at the termination of this charter, at a fair estimation of what said works are worth at that time: *Provided*, That the city shall notify the company of said election on her part at least one year before the termination of this charter; the value of the works to be ascertained by two competent gas engineers selected, one by each of the parties, and, in case of their disagreeing, by an umpire, whom they may select; the proceeds of which sale is to be divided *pro rata* among the stockholders, including the city of Louisville.

§ 20. This charter is to be valid and in full force when accepted by those who hold the majority of the shares of stock in the present Gas Company; and the new company shall become successors to and owners of all real estate and other property belonging to old company.

Approved January 30, 1867.

CHAPTER 1282.

AN ACT to amend an act, entitled "An act to extend the charter of the Louisville Gas Company," approved January 30 1868.

WHEREAS, The city of Louisville and stockholders of the Old Loui-ville Gas Company have accepted the said extended charter, and have agreed to certain amendments thereof, and desire that they may become a part of said extended charter—

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That any person, who may be entitled to a fractional share of stock under the provisions of section second (2d) of said extended charter, may have his or her election either to take the same in cash at par, or have issued a whole share by paying the difference of par value of the fractional share and a whole one.

§ 2. That the gas company shall be bound to extend its main pipes whenever the public and private lights immediately arising from said extension will pay seven (7) per cent. profit on the cost thereof; and so much of the fifth (5th) section of said extended charter as requires a profit of eight (8) per cent. on the cost of an extension is hereby repealed

§ 3 That the gas company shall put lamp posts, fixtures, &c., along the street mains as they are extended, at a distance apart of about two hundred feet, or as near that distance as the dimensions of the squares may admit, so as to make an equal distribution of the same; and whenever there are street mains on both sides of the streets, the lights are to be located so as to alternate, preserving the same distance, namely, about two hundred feet for the lamps on each side of the street The gas company are to keep the lamp in order, to furnish gas, and light and extinguish the same, giving to each light an illuminating power of about twelve sperm candles; and the time of burning shall be from the close of twilight at evening until dawn of day in the morning, except in clear moonlight nights, when the light may be dispensed with; and said public lights shall be furnished to the city at actual cost; but in no event to exceed thirty-five ($35) dollars per lamp; and the charge for gas to private consumers shall be so graded as that the Company's profits shall not exceed twelve per cent. per annum on the par value of the stock; ten (10) per cent. of which may be drawn by the stockholders, in semi-annual dividends, and the other two per cent. to be laid out for extensions, and

not to be capitalized, except at the end of every five years. Section seven (7) of said extended charter is hereby repealed.

§ 4. That the stock and other interest the city has, or may have, in the gas works, shall not be disposed of; but the dividends arising therefrom shall, as far as necessary, be applied to paying for the public lights of the city; and all investments of unused dividends belonging to the city shall be made by the directors of the gas company, as trustee, with the concurrence and advice of the city council, and held as a permanent trust during the continuation of this charter.

§ 5. That said gas company shall have the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuation of this charter, and of vending coal gas-lights and supplying the city and citizens with gas by means of public works: *Provided, however*, This shall not interfere with the right of any one to erect, or cause to be erected, gas-works on their own premises, for supplying themselves with light.

§ 6. That no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company.

§ 7. This act shall take effect from its passage.

Approved January 22, 1869.

CHAPTER 702.

AN ACT to incorporate the Citizens' Gas-light Company of Louisville.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That Thomas C. Coleman, Walter N. Haldeman, James Barrett, H. V. Newcomb, G. F. Fuller, E. D Standiford, Isaac Caldwell, F. F. Fox, and J. P. Johnston, and other associates, successors, and assigns, are hereby created a body-corporate and politic, by the name of "The Citizens' Gas-light Company of Louisville," for the purpose of making, selling, and distributing gas for the purpose of lighting the buildings, public and private, in the city of Louisville and its adjoining territories, together with the streets, highways, lanes, alleys, parks, and other public places, and for other purposes, and by that name shall have perpetual succession; and are made capable in law to take, purchase, possess, retain, have, hold, and enjoy, to them, their successors and

assigns, estates and interests of every kind, real, personal, and mixed, legal or equitable, and the same to manage, control, let, lease, assign, grant, bargain, sell, alien, convey, confirm, and dispose of, at pleasure; to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended against in any competent court of law or equity, and before all tribunals to appear and protect its rights; to make, have, and use a common seal, and the same to break, alter, and renew at pleasure; and shall also have power to establish and put in execution such by-laws and regulations, not contrary to law, as they may deem necessary or convenient for the government of said corporation, and the management of their property and concerns, and the duties and employment of their officers and agents, and the same to change, alter, or amend, and generally to do all things necessary and proper to carry into effect the powers and privileges herein granted.

§ 2. The capital stock of said company shall consist of seven hundred and fifty thousand dollars, in shares of one hundred dollars each; but the stockholders of any special meeting, called for that purpose, may increase such capital stock to any sum not exceeding two millions of dollars, under such regulations and conditions as they may deem expedient, the holders of a majority of the stock voting for such increase, and casting one vote, in person or by proxy, for each share of such stock held by them.

§ 3. Said company shall have power and authority, with the consent of the general council of said city, to open the ground in any highway, street, lane, alley, park, or other public place within the limits aforesaid, and lay and repair therein their pipes for conducting gas, said company restoring the same to as good condition as before, within a reasonable time thereafter, said company being required, in so doing, not to injure any gas or water-pipe, or connection or sewer laid therein; and said corporation being liable to the city of Louisville for any damage it may have to pay for its negligence in so laying, repairing, or restoring as aforesaid; and such power and authority is subject to such reasonable regulations as the mayor and city council may make for the protection of life, property, and health of citizens.

§ 4. The said company shall have authority to open ground, to lay and repair pipes for conduction of gas to consumers in Portland and other towns adjoining said city of Louisville, in the highways, streets, lanes, alleys, and other public places thereof, subject to such reasonable

regulations by the municipal authorities thereof, respectively, as they shall prescribe, said company laying, repairing, and restoring the same, to like condition as before, within a reasonable time.

§ 5. The shares in said capital stock are hereby declared to be personal estate, and transferable on the books of the company in such manner as the board of directors shall prescribe; and the whole of said capital stock shall be paid in within two years from the organization of the company under this charter, and in such equal installments, and at such times as shall be prescribed by the directors, of which ten days' notice shall be given personally to each stockholder, or by mail, or published in one of the newspapers daily printed in Louisville, of the time and place of paying the same; and said capital stock shall not be liable to assessment except for said installments to the amount in all of one hundred dollars on each share; and said company may provide, by its by-laws, for the forfeiture of stock in part, or only a part of which has been paid, and for the sale of such stock to pay any balance due thereon, and sue for and collect such balance due thereon as may be deemed most expedient, and may likewise, by by-laws, provide that unpaid shares of stock shall not be voluntarily transferred until the whole amount of such stock is paid in, and may proceed direct against the original subscriber or his assigns.

§ 6. The first meeting of the company for the election of directors and organization under this charter, and for the transaction of any other business of the corporation, may be called at such time and place as shall be fixed by a written or printed notice signed by any one or more of the incorporators named in the first section of this act, and personally served on the other corporators named in said first section of this act, or upon publishing said notice seven days in any newspaper printed in Louisville, at which time and place those corporators, named as aforesaid, who shall meet at said time and place, shall constitute a quorum for doing business, and who may choose directors for said company, consisting of not less than three nor more than seven members, who shall severally hold their offices for one year, and until others are chosen to act in their stead, unless sooner removed by the corporation or by death. An annual meeting of stockholders shall be had one year from the day on which the first or the preceding election of a board of directors shall have taken place for the election of a new board, unless it shall be a Sunday, in which case the Monday following; but the neglect or other fault of the Company to

so elect, or to do any other act required to be done by the company, its stockholders or directors, shall not work a forfeiture of this charter, or of the privileges and advantages under the same; and in case of removal or holding over their terms, such board of directors may be elected at any special meetings of stockholders; special meetings of stockholders may be called by the president of the company, or in case of his absence, neglect, inability, or refusal to act, by any of the stockholders, who shall hold one-third of the shares of the stock, of which ten days' previous notice shall be given in a newspaper printed in the city of Louisville, as provided by the by-laws of said company; at any meeting of stockholders two thirds of the shares of stock shall be represented in person or by proxy to constitute a quorum to do business, and a vote for each share shall be cast in person or by proxy at such meeting, but any number of shareholders may adjourn such meeting from time to time until a quorum shall be present.

§ 7. The board of directors shall choose a president and treasurer from among their number, who shall hold their office one year, or until others are choosen and qualify, and may choose such other officers as they may deem expedient, who shall give bonds to the company for the faithful performance of their duties in such sum, and with sureties, as shall be satisfactory to the board. The board shall have the immediate government of the property, business, and affairs of the company, and shall meet as often as they think proper, the president presiding, and in case of an equal division having a casting vote; a majority of the board constituting a quorum, and the board of directors or the president and treasurer, when authorized by the board of directors, shall have power to make contracts, to manage and dispose of the property and funds of the company in such manner as they shall deem for the interest of the stockholders; and the board shall receive no compensation for their services unless voted them by the stockholders, and the directors shall make such dividends annually of the profits, if any, as to them shall seem proper.

§ 8. In all proceedings at law or in equity in which this corporation shall be a party, the leaving of an attested copy of any process with the treasurer, or person acting as such, or at his usual place of business, with some person of suitable age and discretion, shall be deemed sufficient service thereof.

§ 9. The said company shall have power to issue its bonds, to extend its works and pipes, to an amount not ex-

ceeding one-half the amount of capital stock actually paid in at the time.

§ 10. If any person shall willfully or maliciously do, or cause to be done, any act whatever, whereby the works of said company, or any part thereof, or any pipe, conduit, plug, cock, reservoirs, or any engine, machine, meter, or structure, or any matter or thing appertaining to the same, shall be injured, destroyed, stopped, obstructed, impaired, weakened, or interfered with, the person so offending shall forfeit and pay said company double the amount of damages sustained by means of such offense or injury, to be recovered in an action of debt to be brought in the name of said company in any court of competent jurisdiction, together with costs of suit.

§ 11. Any person or persons who shall willfully or fraudulently injure, or suffer to be injured, any pipes, fittings, or meters belonging to this corporation, or prevent any meter from duly registering the quantity of gas supplied through the same, or shall alter the index of any such meter, or in any way hinder or interfere with its proper action or just registering, or shall fraudulently burn the gas of this corporation, or waste the same, shall, for every such offense, forfeit and pay to this corporation the sum of twenty-five dollars, and in addition thereto shall pay to said corporation the amount of damage by them sustained by reason of such injury, prevention, waste, consumption, or hindrance.

§ 12. Any person duly authorized, in writing, by this corporation, over the signature of the president or treasurer, at all proper times of the day, may, on presenting such written authority, enter any dwelling, storeroom, place, or building supplied with lighting apparatus by this corporation, for the purpose of inspecting and examining the meters, pipes, fittings, and works for supplying and regulating the quantity of gas consumed or supplied, and in case of nonpayment of any sum due for gas previously supplied according to his or their contract with this corporation, to prevent and stop the gas from entering the premises of such person or persons, and take and carry away any such meter, pipe, fitting, or other works from the mains or pipes of this corporation.

§ 13. This act shall take effect from and after its passage, and be and continue in force for the term of fity years.

Approved March 21, 1872.

Supreme Court of the United States.

LOUISVILLE GAS COMPANY, - - - - - - PLAINTIFFS,

vs.

THE CITIZENS' GASLIGHT COMPANY, - - - DEFENDANTS.

BRIEF FOR DEFENDANT IN ERROR ON MOTION FOR MANDATE.

The unusual and impatient effort of the plaintiff in error to have a mandate issued in this case, before the time when mandates issue in the ordinary course of law, is based upon three grounds; which we will consider seriatim: (See their notice.)

1. The first ground is, because it is alleged the defendant in error (the new company) has been for many years, and still is, manufacturing and selling gas to the citizens of Louisville in competition with the plaintiff in error (the old company), and in violation of its exclusive rights.

Now, the new company has not been making gas for "many years," but commenced in March or April, 1885. When it commenced making and selling the character of gas that it makes, its right to do so had been granted to it by the Legislature of the Commonwealth of Kentucky through its charter, and had been confirmed to it by the ordinance of the general Council of the city of Louisville, and had been recognized as valid by the unanimous decision of the Court of Appeals of Kentucky. It certainly, therefore, was guilty of no wanton

act, but acted in accordance with the law as it was then expressed and declared by the Legislature, the city of Louisville, and the highest Court of the State. It is true, it has continued its business to this time, but neither it, nor its counsel, had an opportunity to see the opinion of this Court until the 29th of December, 1885, and, therefore, it could hardly be expected to cease, up to that time. And since that time, as the affidavits of its officers show, it has been making the requisite investigations to determine whether it is feasible and proper to apply for a rehearing of the important and novel questions involved and decided in this case in connection with the New Orleans gas company case and the New Orleans water company case decided at the same time.

There is nothing unusual in this, and, certainly, no unusual harsh or summary measures should be visited upon it, by reason of this prudent and usual course. When the old company took out the writ of error in this Court, it had the right, by section 1,007, to obtain a supersedeas, as a matter of right. Had it done this the new company would not have built its works. But the old company failed and refused to do this, and waited until the new company had built its works, in reliance on the decision of the Court of Appeals: and, in March, 1885, just as the new company was about to turn on the gas from its completed works, the old company undertook to obtain a supersedeas with which to crush the new company, but failed. Certainly, it can not ask to have summary punishment inflicted upon the new company, by cutting off its right to the usual time for a rehearing, under such circumstances.

2. The second ground for the immediate issue of the mandate is, because it is alleged the new company is insolvent, and the old company has no adequate remedy for the damages heretofore inflicted upon it, and now being inflicted upon it, by the conduct of the new company.

The affidavits of the officers of the new company show that the statements as to insolvency are untrue. They show that the new company has built a works for making the sort of gas that it makes, which works are large enough to supply the entire city of Louisville, and have cost large sums of money, and that the new company is the

possessor of very valuable letters-patent and privileges for making the said kind of gas.

There is nothing in the record to show any damages whatever which the old company would have any right in law to receive from the new company. The injunction given to the new company was from the Court of Appeals of Kentucky, and no damage has been shown. The effort in the affidavit of the president of the old company to show that the new company has very little property assessed on the tax lists of Louisville is explained by the act of the Kentucky Legislature of May 5, 1884 (acts 1883–4, vol. 2, page 800), by which it was provided:

"That the Citizens' Gaslight Company, of Louisville, Kentucky, shall be exempt from city taxes on its property and effects; provided, its prices for public and private lights are not in excess of the prices charged by the Louisville Gas Company, or any other gas company that may be hereafter established in the city of Louisville."

The same exemption was given to the old company; and its tax lists would probably show no assessments whatever, for many years, against it.

There is, therefore, nothing in this point to justify the forfeiture against the new company of its right to the usual time within which to determine upon preparing and filing a petition for a rehearing before the mandate issues.

The third ground for issuing the mandate is, because it is alleged the new company "threatens and gives out in a speech that it intends to continue hereafter to manufacture and sell gas to the citizens of Louisville, in violation of the rights of the old company."

The affidavits filed by the old company are addressed chiefly to this ground, and consist, for the most part, of several newspaper interviews with two subordinate officers of the new company. But those interviews are explained in the affidavits of those officers, filed by the new company. It is shown that those interviews were published on December 8th, 9th, and 21st; and that the opinion of this Court was not received in Louisville, and could not be seen, nor its scope or meaning ascertained, until December 29th, long after those publications. Those publications show on their face, and the affidavits

corroborate this, that they were simply individual conversations with the reporters of the newspapers; and were intended simply to prevent the efforts of the old company to intimidate the customers of the new company, and cause them to quit the new company at once, and to allay the fears of the customers of the new company.

Thus, in the publication of December 9th (the old company's affidavit, pages 8 and 9), it is shown that a number of the consumers of the new company addressed a letter to it, saying: "From intimations thrown out by the old gas company who are urging us to make a change, we fear we may be left in darkness without due notice," and asking for information. To this, the general manager of the new company responded that the new company "promised to give due notice should it become necessary for its customers to provide other lights," and requested them "not to be intimidated by the representations of the agents of our competitors," and closed by saying, that the new company hoped and believed it could continue to supply its customers with gas, but if not, then as soon as the monopoly of the old company was exhausted, it would re-enter the field with renewed energy to give competition.

The publication of December 8th shows, on its face, that the opinion had not been seen, and it was simply an effort to hold its customers until it could ascertain the meaning of the opinion.

The interview with Mr. Charles R. Long is shown to have been for the same purpose; to allay the fears of the customers of the new company, until the opinion could be seen, and its scope and intendment ascertained.

In other words, the new company having large amounts at stake, and having the unanimous opinion of the Court of Appeals of Kentucky in its favor, and not knowing how far this Court had gone, naturally did not desire to have its customers stampeded until it had opportunity to see fully the scope of the opinion of this Court; and these publications were but "hitting back" at the efforts of the old company to cause the customers of the new company to become "panicky," and to leave it. There was a public excitement, and newspaper reporters were bound to publish something; and some sort of general statements were excusable and, indeed, necessary, under

the circumstances. The old company had resorted to the newspapers and the new company's subordinate officers were hitting back. The President of the new company, Mr. Carley (as will be seen from his affidavit), had scrupulously avoided making any statements, or causing any statements to be made whatever, of an official character, but waited patiently to see the opinion of this Court, and have its contents ascertained. All of the affidavits of the new company show that the new company has no intention, and has never had any intention, in any manner to evade or disregard the opinion of this Court, but has simply desired to suspend public opinion until the opinion could be studied.

No publication has at any time been made since the opinion of this Court was received in Louisville, on 29th of December, 1885.

If a mandate is issued at this time, it will, of course, shut off all right and opportunity on our part to apply for a rehearing. Rule 30 of the Supreme Court provides that a petition for a rehearing may be filed only at the term at which judgment is entered, unless by special leave granted during the term. This rule contemplates that the party may have the balance of the term to determine upon whether it is feasible and proper to ask a rehearing, and upon the character of the petition for a rehearing, and to prepare it, and to present it.

In questions of such magnitude and importance as those involved in this case, the time given by the rule is none too much; and it is a settled rule of this Court, that after the mandate is issued, the Court will not consider or entertain a petition for a rehearing.

Thus in Sibbald vs. U. S. (12 Peters, 492), this Court said:

"After a mandate, no rehearing will be granted. It is never done in the House of Lords."

And in Browder vs. McArthur (7 Wheaton, 58), this Court held, that after a mandate issued, the Court would not grant a rehearing.

The same thing was held in Peck vs. Sanderson (18 Howard, 42).

The reason is apparent. It is, that after the mandate had been issued, and the lower Court has gone on and enforced it, it would lead to inexplicable confusion for this Court to rehear the case.

Surely these grounds for an immediate mandate are not sustained.

When it is borne in mind that the new company has built it works under the authority of the Legislature of the Commonwealth of Kentucky, and under the authority of the Mayor and Council of the city of Louisville, and under a solemn and unanimous adjudication of the Court of Appeals of Kentucky; and when it is borne in mind that it has large interests at stake, surely this Court will not permit this summary and unusual proceeding, which will cut off from it the usual time for deliberation and preparation, and deprive it of all opportunity to apply for a rehearing of the weighty questions involved; but will give to it the usual time afforded to other litigants in this tribunal.

Respectfully,

JOHN MASON BROWN,
WM. LINDSAY,
GEO. M. DAVIE,
of Counsel.